Supreme Court, U.S.
FILED

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No. •

IN THE
Supreme Court of the United States

JEROLD DANIEL FRIEDMAN,
Also Known as JERRY FRIEDMAN,
Petitioner,

v.

SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, a California Partnership; KAISER FOUNDATION HOSPITALS, a California Corporation; and KAISER FOUNDATION HEALTH PLAN, INC., a California Corporation,
Respondents.

On Petition For Writ Of Certiorari
To The Court of Appeals of the State of California,
Second Appellate District, Division Five

APPENDIX (VOLUME 2 OF 2) TO PETITION FOR WRIT OF CERTIORARI

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ORDER GRANTING DEMURRER

ORIGINAL FILED

JUL -7 2000
LOS ANGELES
SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JEROLD DANIEL FRIEDMAN, Plaintiff vs. SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, etc., et al., Defendants.	Case BC 224 249 ORDER SUSTAINING DEMURRERS OF KAISER DEFENDANTS DIRECTED TO COMPLAINT; DENYING AND GRANTING LEAVE TO AMEND ON CERTAIN CONDITIONS; PLACING OFF CALENDAR MOTION OF SAID DEFENDANTS TO STRIKE PORTIONS OF COMPLAINT; STRIKING PORTION OF COMPLAINT ON COURT'S OWN MOTION; AND SETTING CONDITIONS FOR FURTHER ATTACKS ON PLEADING.

1. Under both federal and California law it is actionable misconduct to discriminate in the employment context on the basis of religion. A 1972 amendment to Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e, et seq., particularly 42 U.S.C. 2000e (j)) requires employers to make "reasonable accommodations" to the religious beliefs of their employees. Gov. C. 12940 provides that it is an unlawful employment practice for an employer to discriminate based on a person''s religious creed. A major question raised by the present case is whether the Kaiser defendants can be successfully sued by a man who claims that he was discriminated against because, based on his beliefs as a "Vegan", he refused to submit to a mumps inoculation and was accordingly not hired by the Kaiser defendants. In other words, is "Vegan" a religion within the sense of employment discrimination jurisprudence?

2. The history of this case deserves a brief comment. This case has been assigned to a number of judges of this court. This action was filed on February 3, 2000. It was first assigned to Judge Goodson. On April 3, 2000 it was reassigned to Judge Recana. OnApril 12, 2000, the Kaiser defendants filed a "Peremptory Challenge (CCP sec. 170.6)" as to Judge Recana. On April 17, 2000 the case was reassigned to Judge Meiers. On April 26, 2000 plaintiff filed a "Peremptory Challenge-Motion and Declaration in Support, by Plaintiff (CCP sec. 170.6)" as to Judge Meiers. On May 25, 2000 the case was reassigned to the undersigned.

3. In the meantime, on March 24, 2000, the Kaiser defendants filed a demurer and motion to strike directed to the complaint, setting the hearing for April 25, 2000 before Judge Goodson. Largely because of the events referred to above in sec. 2 the hearing on the demurrer and motion to strike has not occurred until July 7, 2000.

4. The substantive factual background includes the following.

4.1 For the past 9 years, plaintiff has been a "strict Vegan", meaning that he believes that "all living beings must be valued equally and that it is immoral and unethical for humans to kill and exploit animals, even for food, clothing and the testing of product safety for humans." Among the consequences of this belief are the plaintiff cannot eat any animal-based substances (meat, milk products, eggs, honey, or "any other food which contains ingredients derived from animals"), that plaintiff cannot use products which have been tested for human safety on animals or which derive any of their ingredients from animals (such as cleansers, soap, or toothpaste). Plaintiff claims that these views are spiritual in nature, that he holds them "with the strength of traditional religious views", that plaintiff has gone so far as to "be arrested for civil disobedience actions at animal rights demonstrations", and that these beliefs occupy a position in plaintiff's life "parallel to that filled by God in traditionally religious individuals adhering to the Christian, Jewish or Muslim Faiths."

4.2 From June 10, 1997, plaintiff worked as a computer contractor through a temporary help agency at a Kaiser pharmaceutical warehouse -- not at a medical office, clinic, or hospital. In March 1998 Kaiser decided to hire plaintiff at a salary of approximately $48,800 a year. On March 26,1998, Kaiser informed plaintiff that Kaiser required that plaintiff undergo an immunization for mumps; plaintiff checked with the Center for Disease Control and learned that the mumps vaccine is grown in the chicken embryos; according, according to plaintiff, being inoculated with the mumps vaccine was an insuperable problem for him. On March 27, 1998 plaintiff advised Kaiser that he was a Vegan and that he was willing to comply with the spirit of the immunization requirement by some means other then subjecting himself to inoculation with mumps the vaccine, including being checked periodically for mumps symptoms, following any other regimen not involving the suffering or

death of an animal, and even agreeing to work off-site. Plaintiff's direct supervisor at Kaiser was willing to go along with plaintiff, but the human resources department was not, and on April 10, 1998 plaintiff was told that April 10 would be his last day of work there. Plaintiff alleges that the sole basis for this was that he refused the mumps vaccination.

4.3 Plaintiff claims that the mumps immunization requirement is inconsistently applied, that visiting physicians who actually do work with patients have not been tested for mumps antibodies and that many other workers have not been screened for mumps.

5. Plaintiff alleges 11 theories of recovery, namely:

5.1 employment discrimination based on religion under Gov. C. 12940;

5.2 failure to maintain a work environment free from discrimination under Gov. C. 12940(i);

5.3 retaliation (based on the notion that the Kaiser defendants' conduct was retaliatory) under Gov. C. 12940(f);

5.4 battery (based on the concept that on March 20, 1998 the Kaiser defendants "injected plaintiff with a medical test that contained animal products and/or product that were tested on animals after having advised the plaintiff that the injection did not contain animal products. . . knowing that plaintiff objected to and not consent to an injection containing animal products and/or products that were tested on animals."

5.5 Invasion of privacy, based on the notion that injecting animal products or products tested on animals into plaintiff's body was an invasion of privacy;

5.6 negligence, based on the theory that the acts referred to in sec. 5.5 were negligently done;

5.7 battery/negligence per se, based on the theory that the requirement that all Kaiser employees be vaccinated for mumps was a human medical experiment to

which plaintiff was subjected without his consent under H. & Saf. C. 24170, et seq.

5.8 international infliction of emotional distress;

5.9 negligent infliction of emotional distress;

5.10 breach of implied in fact contract to the effect that plaintiff would be allowed to continue employment with Kaiser and would be treated fairly; and

5.11 breach oaf the covenant of good faith and fair dealing.

6. The demurrers of the Kaiser defendants to the complaint are:

6.1 Sustained as to purported causes of action 1, 2, and 3 without leave to amend. Said purported causes of action do not state facts sufficient to constitute a cause of action against the Kaiser defendants/demurrants. CCP 430.10(e). They cannot be amended to overcome the defects pointed out by said defendants/demurrants. Plaintiff does not allege ultimate facts showing that Vegan is a religion or a religious creed as those terms are used in the body of law on which plaintiff relies. Note that conclusions of law are not deemed admitted for purposes of ruling on a demurrer. Moncur vs. Los Angeles (1977) 68 Cal.App.3d 118, 121.

6.2 Sustained as to purported causes of action 4 through 9. Said purported causes of action do not state facts sufficient to constitute a cause of action against the Kaiser defendants/demurrants. CCP 430.10(e). Plaintiff does not allege ultimate facts to overcome the time-bar appearing on the face of the complaint or workers'' compensation exclusivity. Plaintiff is granted leave to amend as to these purported causes of action, subject to the terms and conditions set forth below.

7. The motion of the Kaiser defendants to strike portions of the complaint is placed off calendar as moot in view of the foregoing rulings.

8. Plaintiff's portmanteau "agency" allegation (complaint, sec. 17) is conclusory boilerplate, amounting to the

risible assertion by virtue of a somersaulting and serpentine set of authorizations and cross-authorizations every defendant was the agent of every other defendant. Moore vs. Regents of University of California (1990) 51 Cal.3d 120, 134 fn. 12. Pleadings must be truthful. CCP 128.7; 4 Witkin, California Procedure (4th Edition) 459-460, "Pleading" sec. 358. It is obvious that plaintiff could not reasonably have expected for anybody to believe this allegation in its totality. The court strikes it on the court's own motion. It is both false and not drawn in accordance with California law. CCP 436(a) and (b).

9. Plaintiff has made this case unnecessarily difficult by employing the "chain letter" style of pleading. See complaint, secs. 47, 68, 72, 74, 80, 84, 93, 99, 102, 105, and 114, each of which relentlessly incorporates all of the allegations in all of the paragraphs which precede it -- including the paragraphs which themselves incorporate earlier paragraphs. Kelly vs. General Telephone Co. (1982) 136 Cal.App.3d 278, 285. He should not do this again.

10. Plaintiff is granted leave to amend as to purported causes of action 4 through 11 and the material stricken within 5 days, subject to the following terms and conditions.

11. Plaintiff is ordered to do one of the following:

11.1 File and serve an amended pleading within 5 days, which overcomes the grounds of the demurrer and order striking portions of pleading, which complies with the California Rules of Court Rules 311 (b) and 312 (g), and in which only those allegations necessary to state a basis for relief are incorporated by reference in successive counts or causes of action (Kelly vs. General Telephone Co., supra, 136 Cal.App.3d at 285), after carefully considering the implications of amending under the rule of Aubry vs. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 966 fn. 2; Alhambra Transfer & Storage Co. vs. Muse (1940) 41 Cal.App.2d 92, 93; and Sheehy vs. Roman Catholic Archbishop (1942) 49 Cal.App.2d 537, 541, accompany the service copy thereof with a red-lined copy showing precisely what changes were made; or

11.2 Within 5 days file and serve a notice that plaintiff elects not to amend.

12. The Kaiser defendants/demurrants/movants are ordered to do the following if plaintiff amends as provided in sec. 11, above:

12.1 Respond to the amended pleading within 5 days;

12.2 If the response is by demurring and/or motion to strike, set the hearing on the demurrer and/or motion to strike no later than 25 ays from service and filing of the demurrer and/or notice of motion;

12.3 Accompany the demurring and/or moving papers with a red-lined copy of the pleading being attacked to show precisely what changes have been made.

13. The Kaiser defendants are ordered to answer the remaining allegations of the complaint within 5 days after plaintiff fails timely to amend or gives notice that he does not intend to amend whichever occurs first.

14. The provision of CCP 472b and CCP 1013 (a) apply to the time limits set in this order.

15. The Kaiser defendant/demurrants/movants/movants are ordered to give written notice by mail forthwith upon receipt of this order.

DATED: July 7, 2000.

_____

JUDGE OF THE SUPERIOR COURT

MOTION TO AMEND COMPLAINT, ETC.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA,
GENERAL JURISDICTION
FOR THE COUNTY OF LOS ANGELES

JEROLD) DANIEL) FRIEDMAN,) also known as) JERRY) FRIEDMAN,))) Plaintiff,)) v.)) SOUTHERN) CALIFORNIA) PERMANENTE) MEDICAL) GROUP, a) California) partnership;) KAISER) FOUNDATION) HOSPITALS, a) California) corporation;) KAISER) FOUNDATION) HEALTHPLAN,) INC., a) California) corporation;) KAISER) FOUNDATION) ADDED CHOICE HEALTHPLAN, INC., a	**CASE NO. BC224249** **CASE ASSIGNED FOR ALL PURPOSES TO:** **JUDGE:** **Hon. CESAR C. SARMIENTO, Judge** **DEPT.: "55"** **NOTICE OF MOTION AND MOTION TO AMEND COMPLAINT PURSUANT TO C.C.P. § 473, TO SET ASIDE PRIOR ORDERS SUSTAINING DEMURRERS/GRANTING MOTIONS TO STRIKE, OR ALTERNATIVELY ENTER JUDGMENT FOR KAISER TO ALLOW PLAINTIFF TO FILE AN APPEAL; POINTS AND AUTHORITIES; DECLARATION** **DATE: MARCH 28, 2001** **TIME: 8:30 A.M.** **DEPT.: "55"**

California corporation; KAISER FOUNDATION INTERNATIONAL, a California corporation; MACTEMPS, an unknown business entity; AQUENT, an unknown business entity, doing business as MACTEMPS; LASER DESIGNS, Corporation Which Will Do Business in California as MACTEMPS; MERCK & CO., INC.; PASTEUR MÉRIEUX SÉRUMS & VACCINS SA dba PASTEUR MÉRIEUX CONNAUGHT dba AVENTIS PASTEUR; CONNAUGHT LABORATORIES; and DOES 4 through 100,

inclusive,

Defendants.

TO THE DEFENDANTS, AND TO EACH OF THEM, AND TO THEIR ATTORNEYS, IF ANY:

PLEASE TAKE NOTICE THAT on March 28, 2001, at 8:30 a.m., as soon thereafter as the matter may be heard, in Department "55," or of the Los Angeles Superior Court, located at 111 North Hill Street, Los Angeles, California 90012, that Plaintiff JEROLD DANIEL FRIEDMAN, also known as JERRY FRIEDMAN, will move the Court for an Order permitting Plaintiff to file a Second Amended Complaint in this matter pursuant to California Code of Civil Procedure § 473, a "red-lined" copy of which amended Complaint is attached hereto and a copy of which is served herewith, and/or to set aside the prior orders sustaining demurrers and/or granting motions to strike, on the grounds that the court was disqualified and good cause exists therefore. Alternatively, if this motion is denied, in the alternative, the Plaintiff requests that the Court enter judgment for Kaiser on those orders sustaining the prior demurrers and on the dismissal of the last Kaiser cause of action, so that the Plaintiff may file an appeal thereon on the orders sustaining the prior demurrers.

This motion will be made upon the ground that it is in furtherance of justice to allow the filing of such amended complaint, that the prior sustaining of demurrers removing various of the causes of action from the complaint were by a Judge that had a financial interest in this case, and will be based upon this notice of motion, the attached points and authorities attached hereto, the Declaration of Scott D. Myer attached hereto and related documents filed concurrently herewith, the entire file herein, any reply brief, and any further oral or written testimony that the Court allows.

DATED: March 7, 2001 MYER LAW FIRM

/s/ Scott D. Myer

By: _____

SCOTT D. MYER
Attorney for Plaintiff,
JEROLD DANIEL
FRIEDMAN, also known
as
JERRY FRIEDMAN

MEMORANDUM OF POINTS AND AUTHORITIES

1. **Introductory Facts of Case:**

This case is primarily about the KAISER Defendants' (referring to SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, KAISER FOUNDATION HOSPITALS and KAISER FOUNDATION HEALTH PLAN) failure to accommodate the Plaintiff's religious ethical belief of not harming animals that is the Plaintiff's ethical and moral equivalent of his religion. The Plaintiff is an ethical Vegan and was a Computer Technician *working in a non-public, non-health care facility, warehouse* for Kaiser in Downey, as a contract worker, *having absolutely* ***no*** *contact with patients.* After working for *nearly one-year* for Kaiser, Kaiser liked the Plaintiff's work so well that Kaiser offered the Plaintiff an in-house position doing the same work, at the same location, *continuing to also have absolutely* ***no*** *contact with patients.* However, Kaiser required the Plaintiff to undergo a health/vaccination screening.

The Plaintiff has an ethical Vegan belief of not harming animals. When the Plaintiff, a contract worker at Kaiser in April of 1998 refused - for ethical and religious reasons - to take a mumps vaccination that included material from chicken embryos, his employment contract/work offer with Kaiser was canceled and a full-time work offer was rescinded and he was removed from Kaiser under his contract. The Plaintiff's job was rescinded solely because he refused to take a mumps

vaccination which violated his strongly held ethical principles and beliefs, and he suffered severe damages as a result.

The reason that the Plaintiff refused the test because it is grown in chicken embryos, violating his ethical Vegan beliefs, which prohibit the eating, wearing or using of any animal products. According to the Plaintiff's ethical Vegan belief system, egg-laying hens suffer greatly in chicken factory farms, and the use of unborn chickens to culture the mumps vaccine causes further unnecessary deaths of chickens.

Additionally, subsequently the Plaintiff also discovered that a tuberculosis ("TB") test administered to him by Kaiser - which, he had been assured by Kaiser, contained no animal products - did, in fact, include a bovine (cow) serum, negating his consent and leading to a battery. MERCK, the distributor, and AVENTIS, the manufacturer, (in the Complaint AVENTIS is referred to as CONNAUGHT), of the TB test, negligently misadvised KAISER (who relayed the information to Plaintiff) that the TB test was "Vegan friendly" and did not contain animal ingredients nor was it tested on animals. Further, Kaiser's use of the TB test in this matter, violated state law, protecting people from being unwitting experimental subjects. This portion of the lawsuit alleges that the lawsuit is that the Plaintiff was not fully informed about the medical procedure, as required by law, and alleges that he was made a "medical experiment" under the law.

As a result of the Defendants actions, the Plaintiff has suffered loss of income, pain and suffering, post-traumatic stress disorder, embarrassment, anxiety, humiliation and extreme and severe mental anguish and emotional distress because of his employment termination, and the injection of cow serum, which goes against his ethical Vegan beliefs.

2. <u>Amendments to Complaints Should Be Allowed in The Furtherance of Justice And to Allow All Disputes Between The Parties to Proceed to Trial</u>:

"The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading

or proceeding . . . The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars . . . " [C.C.P. § 473].

It is judicial policy to resolve all disputes between the parties on their merits, and to allow amendment of the pleadings to put all such disputes at issue at the time of trial.

"While a motion to permit an amendment to a pleading to be filed is one addressed to the discretion of the court . . . it is a rare case in which a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case . . . If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error, but an abuse of discretion." [Calif. Cas. Gen. Ins. Co. v. Sup.Ct. (Gorgei), (1985) 173 Cal.App.3d 274, 278, 218 Cal.Rptr. 817, 819 (emphasis added).]

Here, none of the proposed amendments will prejudice the defendants. The Plaintiff has not only objected to these causes of action were sustained out of the complaint by demurrers, but the Plaintiff also filed a Petition for Writ to the Court of Appeals, which was summarily denied, presumably based upon the fact that the Plaintiff has the right to appeal such adverse ruling upon judgment herein. Unless these religious discrimination causes of action are restored to this case, it is inevitable that the Plaintiff will appeal the sustaining of the Demurrers to same.

"Trial courts are vested with the discretion to allow amendments to pleadings in furtherance of justice . . . That trial courts are to liberally permit such amendments, at any stage of the proceeding, has been established policy in this state . . . resting on the fundamental policy that cases should be decided on their merits." [Hirsa v. Superior Court (Vickers), (1981) 118 Cal.App.3d 486, 173 Cal.Rptr. 418.]

3. Upon a Showing of "Good Cause," the Prior Rulings Made by a Disqualified Judge May Be Set Aside by the Judge Who Replaces the Disqualified Judge:

Upon a showing of "good cause," the prior rulings made by a disqualified judge may be set aside by the judge who replaces the disqualified judge. *Code of Civil Procedure* §170.3(4). Therefore, based upon a showing of "good cause" the prior sustaining of the demurrers and motions to strike should be set aside by this Court. Good cause is shown herein.

Furthermore, even if good cause for the setting aside of the prior sustaining of the demurrers and motions to strike is not shown, this Court still should allow leave to amend the Complaint, as the granting of leave to amend is always within the discretion of the trial court, even up to and including during the time of a trial. Therefore, leave to amend should be granted in any event.

4. Ethical Vegan Beliefs Qualify For Religious Discrimination Protections:

After the hearing of the original Demurrer by the KAISER defendants, the Court sustained the Demurrer to the first three causes of action, i.e., the religious discrimination causes of action, without leave to amend. These causes of action should not have been subject to a demurrer being sustained. Even if deficient, these causes of action should have been afforded leave to amend.

Defendants demurrer to the first, second and third causes of action essentially on the grounds that Ethical Veganism is not a religion under the anti-discrimination statutes.

The Defendants essentially admitted in their memorandum of points and authorities that Plaintiff pleads the elements of religious discrimination in his Complaint. Despite this, they make the unsupported contention that Vegan cannot ever be considered a religion or its equivalent under the anti-discrimination statutes. The Defendants cited to Federal cases (we are alleging State Court violations), in

other Circuits that are not even on point. In fact the references to these cases are disingenuous and not analogous in the least. One of the cases cited, *United States v. Meyers*, 906 F.Supp. 1484, 1504 (D. Wy. 1995), aff'd, 95 F.3d 1475 (10th Cir. 1996), cert. denied, 522 U.S. 1006 (1997), which held that the beliefs held by the founder of the Church of Marijuana more accurately espouse a philosophy or way of life rather than a religion, is not only merely a district court case, but it is based upon Federal law, not state, is out of district (California is in the 9th Circuit) and is based upon illegal conduct (marijuana usage), whereas the Plaintiff FRIEDMAN's beliefs are clearly *not* illegal. It is disingenuous to compare beliefs in illegal activities (which anti-discrimination statutes do not protect) compared to the plaintiff's sincere Ethical Vegan belief in non-violence to animals of all kinds (which clearly is not illegal and anything but illegal).

Plaintiff's Ethical Veganism beliefs are sincere. They are not illegal. Plaintiff's beliefs occupies the place of importance parallel to religion. It should be noted that "vegetism" is not the same as Ethical Veganism, let alone Veganism. Again, "vegetism" is not Veganism. The reason for this is "vegetism" does not include the moral and ethical components that Veganism includes. Further, Plaintiff's views do fit the *Meyers* factors. Veganism and Ethical Veganism are not confined to one question alone, it is much broader. Vegans do not just eat vegetables (as under "vegetism), but additionally such Vegan beliefs encompass all aspects of one's beliefs, from not only not eating meat, but not eating dairy products, not using soap derived from animal products, not wearing leather, wool, silk or other animal products, and, more to the point of this case, not getting vaccinated with vaccines made, derived or tested on animals.

All forms and aspects of religion, however eccentric, are generally included. *Cooper v. General Dynamics, Convair Aerospace Div.* (5th Cir. 1976) 533 Fed.2d 163, 168-169, *cert denied*, 43 U.S. 908 (1977). A religion does not require a formal

organization or a "written form" to be protected by equal employment opportunity laws. [See *Brown v. Dade Christian Schools, Inc.* (5th Cir. 1997) 556 Fed.2d 310, 311-312, cert. denied, 434 U.S. 1063].

Further, it is not the case that only "institutional religions" are protected by the *FEHA* (and *Title VII* as well). Neither the case law, nor the Code and Regulations promulgated thereby, support such a position that only "institutional religions" are protected. It should be kept in mind that the various branches of the Protestant Christian churches, such as Methodist, Baptist, Lutheran, Episcopalian, Presbyterian, etc., at one time were *not* considered "institutional religions," with the Roman Catholic Church being the only "institutional" Christian religion, hence the term "Protestant," as in "protest."

A California tax case that set forth a very broad definition of religion and religious beliefs, *Fellowship of Humanity v. County of Alameda* (1957) 153 Cal.App.2d 673, 315 P.2d 394, has even been cited as authority in two U.S. Supreme Court cases. (See *School Dist. v. Schempp* (1963) 374 U.S. 203, 302, 10 L.Ed.2d 844, 903, 83 S.Ct. 1560, 1613, and *Torcaso v. Watkins* (1961) 367 U.S. 488, 495, 6 L.Ed.2d 982, 987, 81 S.Ct. 1680, 1684). This case included "Taoism, classic Buddhism, and Confucianism" as religions. Id., at pp. 684, 690. And also includes "humanists" and others that do not believe in "God or gods." Id., at pp. 680, 687 and 690. This case defined religion primarily in a constitutional setting, and should include the Plaintiff herein's ethical Vegan beliefs. However, the definition of religion in a anti-discrimination setting, such as *FEHA* here, should be broader than that in the constitutional (usually, Establishment Clause) setting in order to serve the differing public policy purpose of eliminating discrimination in the workplace.

Similarly, guidelines issued by the Internal Revenue Service to determine if an organization is organized and operated exclusively for religious purposes focus on a

nonsecular definition of religion. The guidelines posit two basic questions: 1) Are the organization's beliefs truly and sincerely held by those professing them, as opposed to a mere sham, and 2) Are the practices and rites associated with the organization's belief or creed illegal or contrary to clearly defined public policy. If beliefs are truly and sincerely held, and practices do not violate law or clearly defined public policy, the Service will not question the religious nature of the organization's beliefs. [*I.R.S. Code* §[7.8.1]3.3.2 (1999)].

Ethical Veganism is a sincerely held set of moral and ethical values that rise to the level religious beliefs, and should be afforded religious protections as such.

A. <u>Religious Discrimination Prohibitions In General</u>:

Both *Title VII* of the *Civil Rights Act of 1964* and the *California Fair Employment and Housing Act, California Government Code* §12900, et seq. (hereinafter referred to as "*FEHA*") prohibit employment discrimination based on religion [see 42 *U.S.C.* § 2000e-2(a) *(Title VII)*; California Government Code §12940(a)-(d), (i), (j) *(FEHA)*]. Not only is religious discrimination in hiring, firing, compensation, and the terms, conditions, and privileges of employment unlawful [42 *U.S.C.* §2000e-2(a) *(Title VII)*; *Gov. Code* §12940(a) *(FEHA)*], but there is an affirmative duty on the employer to accommodate an individual's religious beliefs or observances [42 U.S.C. §2000e(j) *(Title VII)*; *Gov. Code* §12940(j) *(FEHA)*]. In this case, Plaintiff has sued herein under *FEHA*.

B. <u>Definition of Religion Under *FEHA*</u>:

"Religious creed," as it is used in the *FEHA*, not only includes any traditionally recognized religion, but also includes beliefs, observances, or practices that an individual sincerely holds and that occupy in his or her life a place of importance parallel to that of traditionally recognized religions. See 2 *Cal. Code Reg.* §7293.1, attached as Exhibit "A."

California Government Code §12926(o), defines the religion terms as meaning that "'Religious creed,' 'religion,'

'religious observance,' 'religious belief, and 'creed' include all aspects of religious belief, observance, and practice." *California Government Code* §12935, regarding the "Functions, powers and duties of commission," provides that "The commission shall have the following functions, powers, and duties: (a) To adopt, promulgate, amend, and rescind suitable rules, regulations, and standards (1) to interpret, implement, and apply all provisions of this part, (2) to regulate the conduct of hearings held pursuant to Sections 12967 and 12980, and (3) to carry out all other functions and duties of the commission pursuant to this part."

Under the discrimination prohibitions of *FEHA, California Government Code* §12940(a), (b), (d) and (c), discrimination of an employee or applicant is unlawful if committed by an employer, labor organization, employment agency or apprenticeship programs or any program leading to employment. Further, an "employer" for the purposes of the *FEHA* prohibitions against discrimination is defined in California Government Code §12926(d), which defines an "employer" as an individual or entity (other than a nonprofit religious association or corporation) regularly employing five or more persons or "any person acting as an agent of an employer, directly or indirectly." See discussion in Bee Hive Answering Serv. (1984) No. 84-16 at 14, *FEHC Precedential Decisions* CEB 8 (Cal CEB 1984-1985), which held that a person acting as an agent of an employer is a person who "significantly affects access to employment."

Pursuant to this authority, the Commission has defined "religious creed." 2 *Cal. Code Reg.* §7293.1, (attached as Exhibit "A" hereto), regarding "Establishing Religious Creed Discrimination," states, emphasis added, that "'Religious creed' includes any traditionally recognized religion as well as beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life *a place of importance parallel to that of traditionally recognized religions. . . .*" 2 *Cal. Code Reg.* §7293.3 likewise requires employers to "make

reasonable accommodation to the known religious creed of an applicant or employee." Even the under federal regulations, "religious practices" include moral or ethical beliefs about what is right and wrong that are sincerely held with the strength of traditional religious views [See 29 C.F.R. §1605.1]. This regulation has even been used to show that even if no religious group espouses such beliefs, the belief can still be a religious belief of the employee or prospective employee, which would appear equally applicable under *FEHA*.

Clearly, under the regulatory definition, the Plaintiff beliefs about ethical Veganism qualify as "religious creed." The Plaintiff has plead that he "holds these beliefs with the strength of traditional religious views..." [Complaint, page 2, line 24], and that "These are sincere and meaningful beliefs which occupy a place in the Plaintiff's life parallel to that filled by God in traditionally religious individuals adhering to the Christian, Jewish or Muslim Faiths" [Complaint, page 2, line 28, to page 3, line 2].

2 *Cal. Code Reg.* §7293.1, continues by saying that "Religious creed discrimination may be established by showing: (a) Employment benefits have been denied, in whole or in part, because of an applicant's or employee's religious creed or lack of religious creed [or] (b) The employer or other covered entity has failed to reasonably accommodate the applicant's or employee's religious creed despite being informed by the applicant or employee or otherwise having become aware of the need for reasonable accommodation."

Further, the Plaintiff requests that the Court take judicial notice of the *U.S. Equal Employment Opportunity Commission's (EEOC's)* Determination in *Anderson v. Orange County Transit Authority,* Charge No. 345960598, where the *EEOC* determined that Anderson, who was a "strict vegetarian due to moral and ethical beliefs as to what is right and wrong, and who sincerely held these beliefs with the strength of traditional religious views," was protected by the anti-religious discrimination statutes. Likewise, the Plaintiff

should be so protected by the anti-religious discrimination statutes here, too.

Thus it is clear that the Plaintiff's ethical Vegan beliefs are protected under the anti-discrimination statutes protecting religious beliefs and creed. Even if the Court should find that Veganism is not a religion for all that practice it, the form of ethical Vegan beliefs and practices of the Plaintiff do qualifies as religious beliefs and creed under *FEHA*. Furthermore, as to the retaliation cause of action, cause of action no. three, it should not matter whether Veganism is a religion or not. What matters is whether the Plaintiff reasonably believed it was a religion when he complained and protested about Kaiser not reasonably accommodating his Vegan beliefs. Additional language has been added to this effect to make this clearer.

5. **Leave to Amend Should be Liberally Granted:**

"Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." [*Angie M. v. Sup.Ct. (Hiemstra)* (1995) 37 Cal.App.4th 1217, 1227, 44 Cal.Rptr.2d 197, 204]. In fact, it has been held to be an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action. [*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349, 134 Cal.Rptr. 375, 384; *Okun v. Sup.Ct. (Maple Properties)* (1981) 29 Cal.3d 442, 460, 175 Cal.Rptr. 157, 168].

6. **In the Event Leave to Amend is Not Granted, the Plaintiff Requests that a Judgment Be Entered on the Kaiser Dismissal so that an Appeal Can Be Filed on the Orders Sustaining the Demurrers to the Original and First Amended Complaint as to Kaiser:**

While the Plaintiff believes that leave to amend should be granted and/or the prior ordered set aside, based upon either good cause and/or the court's stock ownership in one of the defendants, the Plaintiff, as a last resort, requests in the alternative that a Judgement be entered on the Kaiser defendants sustaining of the demurrers and dismissal of the

remaining cause of action against the Kaiser defendants so that an appeal can be filed on the Orders sustaining the Demurrers.

7. **There Exists "Good Cause" for and There is No Prejudice to Allow the Plaintiff Leave to Amend the Complaint:**

Based thereupon, the Plaintiff JEROLD FRIEDMAN respectfully requests that the Court grant leave to amend the complaint as set forth in the attached Declaration. In light of the subsequent partial dismissals and other intervening events after the prior sustaining of demurrers by the prior Judge during a period the Judge had a legally presumed prejudicial interest in the case, i.e., the stock ownership in one of the Defendants, which presumed condition of prejudice was not known to the Plaintiff until after these events had occurred, the only way to correct and remedy the prejudice and inequity and the appearance of possible bias by the Court in this case is to allow the Plaintiff leave to amend, as requested by the Plaintiff, and let the Defendants demurrer again, if that is their choice, to the amended Complaint. Without the granting of the request for leave to amend the complaint, the prior sustaining of the demurrers is inextricably intertwined with the appearance of possible bias by the Court, based upon the Court's ownership of stock in not only a company that is inextricably involved in the facts of this case, i.e., Merck & Co, but also was a Defendant in this action!

No prejudice or delay will be involved to any of the parties either by granting the motion for leave to amend. First, the Merck and Aventis defendants had Motions to Strike (the equivalent of Demurrers) pending at the time of the Court's first disclosure of stock ownership in the defendant. Second, the Plaintiff had a request in its oppositions to those demurrers for leave to amend the complaint pending at the time of the Court's first disclosure of stock ownership in the defendant. Finally, there is no benefit to the Kaiser defendants to have an appeal filed, as one will be, to the sustaining of the demurrers to the religious discrimination causes of action, only to have

the matter remanded by the Court of Appeals on the issue of either the appearance of bias by the trial court in sustaining those demurrers or the issue of the Court's failure to have granted leave to amend at that time, all the while the Court holding an undisclosed stock ownership interest in one of the defendants, without the Court of Appeals addressing the issue of whether Veganism can be a religion, which is definitely possible on the current record. In this regard, it should be noted that the Court originally denied leave to amend to the religious discrimination causes of action notwithstanding and in the face of the Plaintiff requesting leave to amend those causes of action because they were not plead as best that they could be. Couple that with the Court's undisclosed stock ownership in one of the Defendants and you have a strong case that the denial of leave to amend to the *original* complaint as to the religious discrimination causes of action was not only infected with an appearance of bias, but also clearly an abuse of discretion. Neither this Court, equity nor the parties are benefitted by an unnecessary appeal of an issue that can be remedied merely by this Court's granting the requested motion for leave to amend at this point. By so granting such leave to amend, all parties, including the Defendants, will have all of their legal and factual issues as to the merits of this case preserved without being commingled with unnecessary issues of possible bias by the Court or failure to grant leave to amend to an *original* Complaint. The second amended complaint additionally removes a few defendants that were the wrong defendants and incorporates in the allegations Doe defendants that had previously been added to this lawsuit.

8. **Conclusion:**

Based upon the above, good cause exists setting aside the prior orders sustaining demurrers and/or granting motions to strike based upon the prior judges stock ownership in one of the defendants. Furthermore, even if good cause does not exist to set aside these orders, good cause exists to allow the Plaintiff leave to amend the Complaint. Finally, if

the Court does not agree in either of these regards, a Judgment should be entered for the Kaiser defendants on the prior sustaining of the demurrers and the dismissal of the tenth cause of action so that the Plaintiff can file an appeal of the causes of action in the demurrers that had been sustained. However, this Plaintiff believes that leave to amend should be granted.

DATED: March 7, 2001

MYER LAW FIRM
/s/ Scott D. Myer

By: _____
SCOTT D. MYER
Attorney for Plaintiff,
JEROLD DANIEL
FRIEDMAN, also known
as
JERRY FRIEDMAN

DECLARATION OF SCOTT D. MYER

I, SCOTT D. MYER, DECLARE AND STATE AS FOLLOWS:

1. I am an attorney at law, duly licensed and admitted to practice law before all the Courts of the State of California, and am the attorney of record for Plaintiff, JEROLD DANIEL FRIEDMAN, also known as JERRY FRIEDMAN, herein. Based upon this, and my review of the entire file in this matter, I am competent and qualified to testify as set forth herein.

2. On February 3, 2000, Plaintiff filed his original Complaint in this action.

3. The KAISER defendants filed a Demurrer to the original complaint. After various judicial reassignments it was reset for July 7, 2000. Plaintiff filed oppositions to said Demurrers.

4. On June 8, 2000, two ex parte hearings were held, on behalf of an amicus curiae "In Defense of Animals,"

that attempted to obtain permission to file an Amicus Curiae Brief. The Court denied that request.

5. On July 7, 2000, the Plaintiff filed Doe Amendments for Doe 1 to MERCK & CO., INC., Doe 2 to Pasteur Mérieux Sérums & Vaccins SA dba Pasteur Mérieux Connaught Dba Aventis Pasteur and Doe 3 to CONNAUGHT LABORATORIES. At the time of filing these Doe Amendments, I not only did not know that the Honorable Ronald M. Sohigian may have owned stock in the defendant MERCK & CO, INC., but I also did not know the ruling on the Demurrer that was heard that same date because said Demurrer was taken under submission, with the ruling thereafter sent out by mail.

6. On July 7, 2000, the Court holds a hearing on the KAISER defendants Demurrer to the original Complaint. The Court takes the matter under submission. The Court thereafter sustains the KAISER defendants' Demurrer as to the first three causes of action without leave to amend and as to causes of action four through nine with leave to amend.

7. The First Amended Complaint herein was filed by Plaintiff on July 17, 2000, which complaint listed, among other defendants, defendant MERCK & CO., INC. in the caption of the Complaint.

8. On or about July 26, 2000, the KAISER defendants served a Demurrer to the First Amended Complaint on the Plaintiff. The caption of the Demurrer listed the defendant MERCK among the listed defendants. On or about that same date, the MacTEMPS/AQUENT defendants also served a similar Demurrer upon the Plaintiff.

9. On August 4, 2000, the Plaintiff filed Oppositions to the Demurrers by the KAISER defendants and the MacTEMPS/AQUENT defendants to the First Amended Complaint.

10. On or about August 11, 2000, the KAISER defendants served their Reply Brief to their Demurrer to the First Amended Complaint upon the Plaintiff. The caption of

the Reply Brief listed the defendant MERCK among the listed defendants. The MacTEMPS/AQUENT defendants served their Reply Brief on or about this same date, too.

11. On August 16, 2000, the Court holds a hearing on the KAISER defendants and the MacTEMPS/AQUENT defendants Demurrers, and sustains them without leave to amend as to causes of action four through nine and eleven, without leave to amend.

12. On or about August 25, 2000, the KAISER defendants served their Answer to the remainder of the First Amended Complaint.

13. On or about August 29, 2000, the MacTEMPS/AQUENT defendants served their Answer to the remainder of the First Amended Complaint.

14. On or about September 5, 2000, the Plaintiff filed a Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief and Request for Stay of Action Pending Determination of Writ, with the Court of Appeals.

15. On or about September 13, 2000, the Court of Appeals summarily denied the Petition for Writ, presumably because the Plaintiff has the right to file an appeal upon a Judgment being entered at the conclusion of this case.

16. On or about October 20, 2000, the AVENTIS defendants served the Plaintiff with their Demurrer to First Amended Complaint.

17. On or about November 3, 2000, the MERCK defendants served their Answer to First Amended Complaint upon Plaintiff.

18. On November 6, 2000, the Plaintiff filed his Opposition to the AVENTIS defendants' Demurrer to the First Amended Complaint. Then on or about November 9, 2000, the AVENTIS defendants served their Reply to same upon the Plaintiff. The hearing on the AVENTIS defendants' Demurrer to the First Amended Complaint was heard on November 16, 2000. While the Court did grant leave to amend when it sustained this Demurrer by the AVENTIS defendants to the

Sixth Cause of Action, the leave was only as to "purported cause of action 6," not as to the other causes of action. Therefore, in light of the short period of time, to wit, "5 days" to amend, and the fact that leave was granted only as to "cause of action 6," and not the other causes of action, Plaintiff did not file an amended complaint at that time.

19. On or about December 5, 2000, the AVENTIS defendants served their Answer to the First Amended Complaint.

20. On or about December 13, 2000, the AVENTIS defendants served their Motion for Judgment on the Pleadings on the Plaintiff.

21. On or about December 20, 2000, the MERCK defendants served their Motion for Judgment on the Pleadings upon Plaintiff.

22. In December 2000, the Plaintiff settled his claims against the MacTEMPS/AQUENT defendants, and a partial dismissal was therefore filed as to the MacTEMPS/AQUENT defendants on December 29, 2000.

23. Plaintiff filed his opposition to said MERCK Motion for Judgment on the Pleadings on January 8, 2001. At that same time, the Plaintiff also filed his opposition to the AVENTIS Motion for Judgment on the Pleadings.

24. The AVENTIS defendant served their Reply Brief to their Motion for Judgment on the Pleadings on or about January 10, 2001.

25. The MERCK defendants served their Reply Brief to their Motion for Judgment on the Pleadings on or about January 16, 2001.

26. On or about January 16, 2001, the Plaintiff tendered the KAISER defendants a Request for Dismissal of the tenth cause of action, which Request for Dismissal specifically stated that it "preserv[ed] the Plaintiff's right to appeal the prior sustaining of the demurrers to the first (1st) through ninth (9th) causes of action, inclusive." When this Request for Dismissal was tendered to the KAISER defendants,

I did not know that the Court had any stock ownership interest in any of the defendants.

27. On January 18, 2001, during a hearing of the MERCK and AVENTIS defendants Motions for Judgment on the Pleadings, the Court first advised us that it had stock ownership interest in one of the Defendants. The Court thereafter recused itself from this matter.

28. On or about March 6, 2001, this matter was reassigned to Department "55."

29. Attached hereto as Exhibit "A" is a true and correct copy of a "red-lined" version of our [Proposed] Second Amended Complaint. The additions and/or changes are in "red-line" and the deletions are in "strike-out" font. A clean copy of this [Proposed] Second Amended Complaint is attached hereto as Exhibit "B."

I declare under penalties of perjury under the laws of the State of California that the foregoing is true and correct. Executed this date of March 7, 2001, at Los Angeles, California.

/s/ Scott D. Myer
SCOTT D. MYER, ESQ.

[EXHIBITS AND PROOF OF SERVICE REMOVED]

JUDGMENT
IN STATE COURT

ORIGINAL FILED
MAR 29 2001
LOS ANGELES
SUPERIOR COURT

RECEIVED
MAR 29 2001
DEPT. 55

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
GENERAL JURISDICTION
FOR THE COUNTY OF LOS ANGELES

JEROLD DANIEL FRIEDMAN, also known as JERRY FRIEDMAN, Plaintiff, v. SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, a California partnership; KAISER FOUNDATION HOSPITALS, a California corporation; KAISER FOUNDATION HEALTH PLAN, INC., a California corporation; KAISER FOUNDATION ADDED CHOICE HEALTH PLAN, INC., a California corporation; KAISER FOUNDATION INTERNATIONAL, a California corporation; MACTEMPS, an unknown business	**CASE NO. BC224249** **CASE ASSIGNED FOR ALL PURPOSES TO:** **JUDGE:** **Hon. CESAR C. SARMIENTO, Judge** **DEPT.: "55"** ~~**[PROPOSED]**~~ **JUDGMENT IN FAVOR OF SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, a California partnership; KAISER FOUNDATION HOSPITALS, a California corporation and KAISER FOUNDATION HEALTH PLAN, INC., a California corporation** **DATE:** **MARCH 29, 2001** **TIME: 8:30 A.M.** **DEPT.: "55"**

entity; AQUENT, an unknown business entity, doing business as MACTEMPS; LASER DESIGNS, Corporation Which Will Do Business in California as MACTEMPS; MERCK & CO., INC.; PASTEUR MÉRIEUX SÉRUMS & VACCINS SA dba PASTEUR MÉRIEUX CONNAUGHT dba AVENTIS PASTEUR; CONNAUGHT LABORATORIES; and DOES 4 through 100, inclusive,

Defendants.

In Department "55," the Honorable CESAR C. SARMIENTO, Judge Presiding:

WHEREAS, on July 7, 2000, the demurrers of the Defendants, SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, a California partnership; KAISER FOUNDATION HOSPITALS, a California corporation and KAISER FOUNDATION HEALTH PLAN, INC., a California corporation, were regularly heard, in Department "41," the

Honorable RONALD M. SOHIGIAN, Judge Presiding, sustaining said Demurrers as to Causes of Action One, Two and Three without leave to amend;

WHEREAS, on August 16, 2000, the demurrers of the Defendants SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, a California partnership; KAISER FOUNDATION HOSPITALS, a California corporation and KAISER FOUNDATION HEALTH PLAN, INC., a California corporation, were regularly heard on the remaining Causes of Action Four through Eleven, inclusive, in Department "41," the Honorable RONALD M. SOHIGIAN, Judge Presiding, sustaining said Demurrers as to Causes of Action Four through Nine, inclusive, and Eleven, without leave to amend; and,

WHEREAS, on January 29, 2001, a dismissal of the remaining Tenth Cause of Action, as to the Defendants SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, a California partnership; KAISER FOUNDATION HOSPITALS, a California corporation and KAISER FOUNDATION HEALTH PLAN, INC., a California corporation, having been filed;

NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT, on the Complaint herein, the Plaintiff JEROLD DANIEL FRIEDMAN, also known as JERRY FRIEDMAN, shall recover NOTHING, and said Judgment is entered in favor of the Defendants SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, a California partnership; KAISER FOUNDATION HOSPITALS, a California corporation and KAISER FOUNDATION HEALTH PLAN, INC., a California corporation, on All Causes of Action, i.e., on Causes of Action One through Eleven, inclusive.

DATED: MAR 29 2001 /s/ Cesar C. Sarmiento

Hon. CESAR C. SARMIENTO,
Judge of the Superior Court

ATTORNEY'S CERTIFICATE OF SERVICE BY MAIL
[Code Civ. Proc. § 1013a(2)]

I, SCOTT D. MYER, certify: I am, and at all times mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is Myer Law Firm, 11040 Santa Monica Boulevard, Suite 320, Los Angeles, CA 90025-7515.

I served the attached **[PROPOSED] JUDGMENT IN FAVOR OF SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, a California partnership; KAISER FOUNDATION HOSPITALS, a California corporation and KAISER FOUNDATION HEALTH PLAN, INC., a California corporation**, on March 29, 2001, by depositing a copy of the document in the United States mail at City of Los Angeles, County of Los Angeles, State of California, in a sealed envelope, with postage fully prepaid,**[-X-] REGULAR MAIL PLACED INTO A U.S. MAIL POSTAL BOX PRIOR TO THE LAST MARKED PICKUP FOR THE DAY; and [-X-] FAXED to said parties, with the Fax Transmittal Receipt indicating that no error had occurred,** addressed to:

Ms. Debbie Freedman
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who are the attorneys of record for the Defendants in the above-entitled cause. At that time there was regular delivery of United States mail between the place of deposit and place of address, **[-X-] and in the usual course such method of service would usually be received by the addressees no later than the next Court day after filing this document with the Court.**

Dated: March 29, 2001

/s/ Scott D. Myer
SCOTT D. MYER, ESQ.

APPELLANT'S OPENING BRIEF TO COURT OF APPEALS

Appeal No. B150017
(Prior Appellate Matter: B143989)

IN THE COURT OF APPEALS
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

COURT OF APPEALS - SECOND DIST.
FILED
OCTOBER 16 2001
JOSEPH A. LANE Clerk
J. BELCHER
Deputy Clerk

JEROLD DANIEL FRIEDMAN,
also known as JERRY FRIEDMAN,

Plaintiff and Appellant,

vs.

SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, a California partnership; KAISER FOUNDATION HOSPITALS, a California corporation; KAISER FOUNDATION HEALTH PLAN, INC., a California corporation,

Defendants and Respondents.

From The Superior Court for Los Angeles County
Hon. Cesar C. Sarmiento, Judge
and

Hon. Ronald M. Sohigian, Judge
Superior Court Case No. BC224249

APPELLANT'S OPENING BRIEF

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Appeal No. B150017
(Prior Appellate Matter: B143989)

IN THE COURT OF APPEALS
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

JEROLD DANIEL FRIEDMAN,
also known as JERRY FRIEDMAN,
Plaintiff and Appellant,
vs.
SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, a California partnership; KAISER FOUNDATION HOSPITALS, a California corporation; KAISER FOUNDATION HEALTH PLAN, INC., a California corporation,
Defendants and Respondents.

APPELLANT'S OPENING BRIEF

INTRODUCTION

This appeal is from a Judgment [See Appellant's Appendix in Lieu of Clerk's Transcript (hereinafter, referred to as "AA"), p. 000557, et seq.], incorporating the sustaining of two Demurrers [See AA p. 000163, et seq., and AA p. 000342, et seq.], and the denials of a Motion and Requests for Leave to Amend [See AA p. 000556, as well as AA p. 000163, et seq., and AA p. 000342, et seq.].

This case is primarily about allegations regarding Defendants/Respondents' failure to accommodate the Plaintiff/Appellant's religious ethical belief of not harming animals that is the Plaintiff/Appellant's ethical and moral equivalent of his religion. The Plaintiff/Appellant alleges he is an Ethical Vegan and was a Computer Technician *working in*

a non-public, non-health care facility, warehouse for Kaiser[1] in Downey, as a contract worker, *having absolutely **no** contact with patients.* Plaintiff/Appellant alleges that his actual employment was with MacTemps, which entity contracted out his services to Kaiser, and after working for *nearly one-year* for Kaiser as a contract worker through MacTemps, Kaiser liked the Plaintiff/Appellant's work so well that Kaiser offered the Plaintiff/Appellant an in-house position doing the same work, at the same location, *continuing to also have absolutely **no** contact with patients.* However, it is alleged that Kaiser required the Plaintiff/Appellant to undergo a health/vaccination screening. [The Complaint is at AA, p. 000001, et seq., and these allegations are discussed further in the Statement of the Case section below].

The Plaintiff/Appellant has alleged he is has an Ethical Vegan belief of not harming animals. Plaintiff/Appellant alleges that when he, a contract worker at Kaiser in April of 1998 refused – for moral, ethical and religious reasons – to take a mumps vaccination that included material from chicken embryos, his employment contract/work offer with Kaiser was canceled and a full-time work offer was rescinded and he was removed from Kaiser under his contract. Plaintiff/Appellant alleges that his job was rescinded solely because he refused to take a mumps vaccination which violated his strongly held religious ethical principles and beliefs, and he suffered severe damages as a result.

Plaintiff/Appellant alleges that the reason that the Plaintiff/Appellant refused the test because it is grown in chicken embryos, violating his Ethical Vegan beliefs, which prohibit the eating, wearing or using of any animal products.

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[1] Herein "Kaiser" refers to the group of Defendant/Respondents sued herein as SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, a California partnership, KAISER FOUNDATION HOSPITALS, a California corporation, and KAISER FOUNDATION HEALTH PLAN, INC., a California corporation.

system, egg-laying hens suffer greatly in chicken factory farms, and the use of unborn chickens to culture the mumps vaccine causes further unnecessary deaths of chickens.

Although, the *United States Equal Employment Opportunity Commission* issued a *Determination* in a case that Veganism is the equivalent of a religious belief under *Title VII of the Civil Rights Act of 1964*, as amended, there is no known case dealing directly with Veganism or Ethical Veganism as a religious belief. However, in this case, the Court below sustained demurrers as to the causes of action dealing with the religious discrimination in employment, leaving only a breach of the implied in fact contract cause of action. That remaining cause of action has since been dismissed.

Additionally, subsequent to his termination, the Plaintiff/Appellant also discovered that a tuberculosis ("TB") test administered to him by Kaiser - which, he had been assured by Kaiser, contained no animal products - did, in fact, include a bovine (cow) serum, negating his consent and leading to a battery. Further, Kaiser's use of the TB test in this matter, violated a state law to protect people from being unwitting experimental subjects. This portion of the lawsuit alleges that the Plaintiff/Appellant was not fully informed about the medical procedure, as required by law, and alleges that he was made a "medical experiment" under the law.

As a result of the Defendant/Respondents' actions, the Plaintiff/Appellant has suffered loss of income, pain and suffering, post-traumatic stress disorder, embarrassment, anxiety, humiliation and extreme and severe mental anguish and emotional distress because of his employment termination, and the injection of cow serum, which goes against his ethical Vegan beliefs.

QUESTIONS PRESENTED

The main questions and issues presented in this appeal are the following:

1. Ethical Veganism is a Religious Belief or the Equivalent of a Religious Belief for the Purposes of Employment Law Protections In California. The issue presented in this appeal is whether Ethical Veganism is a religious belief or the equivalent of a religious belief, subject to the protections of the *California Fair Employment and Housing Act, Government Code* §12900, et seq., (sometime herein referred to as *FEHA)*, and the administrative regulations promulgated thereunder. The Court below wrongly concluded that Ethical Veganism is not a religious belief nor the equivalent of a religious belief, and was not subject to the protections of the *FEHA*. Also presented is the issue of whether, should the Plaintiff/Appellant have originally failed to plead his belief in Ethical Veganism sufficiently, whether leave to amend should have been granted when the Complaint had not only never been before the court before, but the Complaint had never been previously been amended. The court's ruling was error in failing to hold that Ethical Veganism was a religious belief or the equivalent of a religious belief under the *FEHA*.

2. The Plaintiff/Appellant's Tort Claims are Not Within the Worker's Compensation Exclusivity Provisions as the Actions of the Defendant/Respondent's Falls Outside the Compensation Bargain.

It is clear that the Plaintiff's employment discrimination claims fall outside of worker's compensation exclusivity. This is so clear that the underlying sustaining of the demurrers as to the employment discrimination causes of action was not made on this basis. However, this same analysis should likewise hold that the other causes of action, fall outside the compensation bargain and are therefore also not within the worker's compensation exclusivity.

3. Even if the Demurrers Had Merit, Then Leave to Amend Should Have Been Granted.

While the Plaintiff/Appellant contends that the Demurrers were improperly sustained, even if they were

proper, leave to amend should have been granted at the early stage of litigation that the Demurrers were sustained at.

Additional issues are presented herein.

STATEMENT OF THE CASE

The Plaintiff JEROLD FRIEDMAN sued various KAISER entities for violations of the *California Fair Employment and Housing Act* (*Government Code* §12900, *et seq.*, herein referred to as the *"FEHA"*). [Appellants' Appendix In Lieu of Clerk's Transcript (hereinafter referred to as "AA," p. 000001, et seq.].

According to the Plaintiff/Appellant's pleadings, [See the Complaint herein, AA p. 000001, et seq.], and confirmed by the court in its order, at AA p. 000163, and AA pp. 000164-000165, in particular: For the past nine years, the Plaintiff/Appellant has been a strict Ethical Vegan, meaning that he believes that all living beings must be valued equally and that it is immoral and unethical for humans to kill and exploit animals, even for food, clothing and the testing of product safety for humans. Among the consequences of this belief are that the Plaintiff/Appellant cannot eat any animal based substances, such as meat, milk products, eggs, honey, or any other food which contains ingredients derived from or tested on animals, that the Plaintiff/Appellant cannot use products which have been tested for human safety on animals or which derive any of their ingredients from animals such as cleaners, soap or toothpaste. Plaintiff/Appellant asserts these views as spiritual in nature, that he holds them with the strength of traditional religious views, that Plaintiff/Appellant's views are so strong that he has even been arrested for civil disobedience actions at animal rights demonstrations, that these beliefs occupy a position in the Plaintiff/Appellant's life parallel to that filled by God in traditionally religious individuals adhering to the Christian, Jewish or Muslim Faiths. [See AA p. 000002].

Further, according to the Plaintiff/Appellant's pleadings, [See the Complaint herein, AA p. 000001, et seq.], and confirmed by the court in its order, at AA p. 000163, and AA pp. 000165-000166, in particular: From June 10, 1997, the Plaintiff/Appellant worked as a computer contractor through a temporary help agency, MacTemps, at a Kaiser pharmaceutical warehouse–not at a medical office, clinic nor hospital. In March 1998, Kaiser decided to hire the Plaintiff/Appellant at a salary of approximately $48,800.00 per year. On March 26, 1998, Kaiser informed the Plaintiff/Appellant that Kaiser required that the Plaintiff/Appellant undergo an immunization for mumps; Plaintiff/Appellant checked with the Center for Disease Control and learned that the mumps vaccine is grown in chicken embryos, and according to the Plaintiff/Appellant, being inoculated with the mumps vaccine therefore was in violation of his Ethical Vegan beliefs, that in March 1998, the Plaintiff/Appellant advised Kaiser that he was however, willing to comply with the spirit of the immunization requirement by some means other than subjecting himself to inoculation with the vaccine for mumps, including being check periodically for mumps symptoms, following any other regimen not involving the suffering or death of an animal, and even agreeing to work off-site. Plaintiff/Appellant's direct supervisor at Kaiser was willing to accommodate the Plaintiff/Appellant, however, the upper management/human resources department was not, and on or about April 10, 1998, the Plaintiff/Appellant was told that was his last day. Plaintiff/Appellant alleges that the Kaiser Defendants/Respondents failed to reasonably accommodate his Ethical Vegan beliefs when he refused the mumps vaccination, and when they thereupon terminated his employment agreement.

Further, according to the Plaintiff/Appellant's pleadings, [See the Complaint herein, AA p. 000001, et seq.], and confirmed by the court in its order, at AA p. 000163, and

AA p. 000166, in particular, lines 11 to 15, inclusive: The Plaintiff/Appellant alleges that the mumps immunization requirement is inconsistently applied, that some visiting physicians who actually do work with patients have not been tested for the mumps antibodies and that some other workers have not been screened for mumps either.

The Plaintiff/Appellant filed his COMPLAINT FOR DAMAGES on February 3, 2000. [AA p. 000001, et seq.]. The Complaint alleged eleven (11) causes of action, including the first three (3) for employment discrimination, the first cause of action for employment discrimination against both the Kaiser and MacTemps[2] Defendants/Respondents based on religion under California Government Code §12940, the second cause of action for failure to maintain a work environment free from discrimination under *California Government Code* §12940(i) against both the Kaiser and MacTemps Defendants/Respondents, and the third cause of action for retaliation against the Kaiser Defendants/Respondents only based on the allegation that the Kaiser Defendants/Respondents' conduct was retaliatory under *Government Code* §12940(f). The Kaiser Defendants/Respondents filed their original Demurrer to the Complaint on March 24, 2000. [AA p. 000026, et seq.; See also their Memorandum of Points and Authorities, at AA p. 000032, et seq., and their Motion to Strike, at AA p. 000043, et seq.]

The Plaintiff/Appellant filed his OPPOSITION TO DEMURRER TO COMPLAINT, on April 14, 2000. [AA p. 000049, et seq.; See also Plaintiff/Appellant's OPPOSITION TO MOTION TO STRIKE, at AA p. 000065, et seq.]. An

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[2] Herein "MacTemps" refers to the group of Defendants sued herein as MACTEMPS, an unknown business entity, AQUENT, an unknown business entity, doing business as MACTEMPS, and LASER DESIGNS, Corporation Which Will Do Business in California as MACTEMPS. MacTemps, however, was dismissed after a settlement with them, and is not a part of this appeal. See AA p. 000369.

organization known as "In Defense of Animals" attempted to file an AMICUS CURIAE BRIEF on April 14, 2000, in support of the Plaintiff/Appellant's position. [See AA p. 000072, et seq.]. However, it appears to have been only lodged, not filed.

However, prior to the matter having been heard the case was reassigned, on Mar. 24, 2000, to the Hon. Mel Red Recana from Hon. Carol Boas Goodson, for the Court's administrative reasons. [AA p. 000048]. And, in the interim, both the KAISER Defendants and the Plaintiff filed 170.6 *Code of Civil Procedure* affidavits. Therefore, both the Hon. Recana and then the Hon. Barbara Meiers were removed from the case. The case was then reassigned to the Hon. Judge Sohigian, on May 25, 2000. [AA p. 000080]. [See also Order of July 7, 2000 discussing said transfers at ¶2 and¶3, AA p. 000163, and AA p. 000164, in particular, lines 8 to 22, inclusive.

Two ex parte hearings were heard on the Amicus Curiae Brief of "In Defense of Animals" on June 8, 2000. At that time, the proposed Amicus filed an Application to file the brief. [AA p. 000081, et seq., and AA p. 000083, et seq.] At that same time, the Kaiser Defendants/Respondents filed an ex Parte Application Striking Amicus Curiae Brief. [AA p. 000086, et seq.]. The Plaintiff/Appellant filed a Position Statement in support of the filing of said Amicus brief. [AA p. 000109, et seq.]. However, the Court denied the application to file the Amicus brief. [See the Minute Order reflecting same, at AA p. 000114, et seq.]. A copy of a notice of ruling that the Plaintiff/Appellant provided with regard to the attempt by the Amicus to file their brief is included at AA p. 000115, et seq.

Plaintiff/Appellant filed an [AMENDED] OPPOSITION TO DEMURRER TO COMPLAINT, on June 28, 2000, which is included as AA p. 000119, et seq. Also filed that date was an amended OPPOSITION TO MOTION TO STRIKE, which is included as AA p. 000136, et seq.

On the same date as the hearing of the Demurrer and Motion to Strike, July 7, 2000, the Plaintiff filed an AMENDMENT TO COMPLAINT SEC.474 C.C.P., in order to

amend defendant DOE 1 to state instead the corporation MERCK & CO., INC., as a Defendant. [AA p. 000159].

At the hearing of the original demurrer, on July 7, 2000, the Court took the matter under submission, and thereafter, sustained all of the demurrers to the Fair Employment and Housing Act religious discrimination causes of action, i.e., causes of action one, two and three, without leave to amend. The remainder of the demurrers, i.e., the non-religious discrimination causes of action, were sustained with leave to amend. Causes of action ten and eleven were not a part of the demurrers that date. A copy of he MINUTE ORDER regarding this demurrer and motion to strike is included as AA p. 000161, et seq. Also, the Order Sustaining the Demurrer is included as AA p. 000163, et seq. The Court sets forth the issue herein at AA p. 000164, et seq.

Essentially, the Demurrer to the first three causes of action was sustained because the Court believed that Veganism cannot be a religion or the equivalent of a religion under the Fair Employment and Housing Act ("FEHA") statute, and refused the Plaintiff requested leave to amend on these causes of action related to religious discrimination and/or retaliation.

An initial status conference was held on July 11, 2000. See AA p. 000171, consisting of the Minute Order of same. At that time the Court signed an Order Setting Further Status Conference and an Order re Trial Setting and Trial Preparation [see AA p. 000276, et seq.].

The Plaintiff/Appellant amended his complaint and filed a FIRST AMENDED COMPLAINT, on July 17, 2000. [AA p. 000001, et seq.] However, the portion of the Complaint dealing with employment discrimination against the Kaiser Defendant/Respondents was not allowed to be replead against the Kaiser Defendants/Respondents based upon the prior Order denying leave to amend. Therefore, and for that reason alone, the amended complaint was not plead against the Kaiser Defendants/Respondents for religious

discrimination in the amended complaint. It was, however, plead against the MacTemps Defendants/Respondents as such. [See AA p. 000172, et seq.]

The First Amended Complaint herein was filed by Plaintiff on July 17, 2000, which complaint listed, among other defendants, defendant MERCK & CO., INC. in the caption of the Complaint. On July 26, 2000, the KAISER defendants served a Demurrer to the First Amended Complaint on the Plaintiff.

The Kaiser Defendants/Respondents set a new demurrer to the first amended complaint. [See AA p. 000200, et seq., and AA p. 000207, et seq.] Also at the same time, the MacTemps Defendants/Respondents set a Demurrer to the first amended complaint, which was filed on July 26, 2000. See AA p. 000254, et seq. Their Motion to strike was set for the same time. See AA p. 000270.

The caption of the Demurrer listed the defendant MERCK among the listed defendants. Additionally, the KAISER defendants' Reply Brief's caption listed the defendant MERCK among the listed defendants.

The Plaintiff/Appellant opposed both of those demurrers and the motion to strike by filing Oppositions, on August 4, 2000. See AA p. 000287, et seq., AA p. 000297, et seq., and AA p. 000316, et seq., respectively.

The hearing on these demurrers/motions were held on August 16, 2000, at which time the Court sustained all of the demurrers, with the exception of the tenth cause of action for breach of the implied covenant of good faith, which remained active. A copy of the MINUTE ORDER from hearing of demurrer/motion to strike on first amended complaint, is included as AA p. 000342. This is the second main order that this Petition for a Writ is seeking to vacate and set aside, the other being the July 7, 2000 Order. The Defendants/Respondents served their notices of ruling, which are included as AA p. 000343, et seq., and AA p. 000347, et seq., respectively.

The Kaiser Defendants/Respondents filed their answer to the remaining tenth cause of action for breach of implied contract in the first amended complaint, on August 25, 2000. [AA p. 000351, et seq.]

On September 5, 2000, the Plaintiff filed a Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief and Request for Stay of Action Pending Determination of Writ, with the Court of Appeals. On or about September 13, 2000, the Court of Appeals summarily denied the Petition for Writ, presumably because the Plaintiff has the right to file an appeal upon a Judgment being entered at the conclusion of this case. [See Court of Appeals, Second Appellate District, Division Five, Docket No. B143989].

The parties appearing at that time, filed a JOINT STATUS AND CASE MANAGEMENT REPORT, on Sept. 19, 2000. [AA p. 000355]. At the further status conference, the court issued a written minute order, filed on Sept. 26, 2000, reflecting what had happened. [AA p. 000362].

On November 3, 2000, the MERCK Defendants, including MERCK & CO., INC., the company that Plaintiff would later thereafter find out that the Hon. Sohigian, Judge, owned an interest in, filed their ANSWER TO FIRST AMENDED COMPLAINT. [AA p. 000363].

On December 29, 2000, the Plaintiff dismissed the Aquent/MacTemps Defendants, after settling his claims against them, and they are not a part of this appeal. [AA p. 000369].

On January 18, 2001, the Hon. Sohigian, Judge in this case, for the very first time disclosed that he had ownership in the defendant Merck & Co., Inc. A minute order of Jan. 18, 2001 reflected this fact. [AA p. 000370]. The Court continued a final determination as to his recusal several times. [AA p. 000371, p. 000374 and p. 000388].

On January 16, 2001, the Plaintiff tendered the KAISER defendants a Request for Dismissal of the tenth cause of action, which Request for Dismissal specifically stated that it

"preserv[ed] the Plaintiff's right to appeal the prior sustaining of the demurrers to the first (1st) through ninth (9th) causes of action, inclusive." When this Request for Dismissal was tendered to the KAISER defendants, Plaintiff did not know that the Court had any stock ownership interest in any of the defendants. This dismissal was tendered to the KAISER defendants in order to expedite the appeal of the other causes of action that the Court had previously sustained demurrers to. On January 29, 2001, the KAISER defendants filed a REQUEST FOR DISMISSAL [partial] of Kaiser defendants, that had been provided to them by the Plaintiff in order to expedite the appeal of this matter. [AA p. 000372].

All parties did not consent to the Hon. Sohigian continuing as judge on this case in light of the stock ownership in one of the defendants. [AA p. 000375 and, more particularly, p. 000385]. On February 16, 2001, the Court finally disqualified/recused itself in this case. [AA p. 000392 and p. 000393]. Thereupon, the case was re-assignment to the Hon. Cesar C. Sarmiento, Judge, on March 3, 2001. [AA p. 000397].

Based thereon, i.e., based upon the disqualification, and among other reasons, the Plaintiff filed a MOTION TO AMEND COMPLIANT, TO SET ASIDE PRIOR ORDERS, OR ALTERNATIVELY ENTER JUDGMENT, which was filed Mar. 8, 2001. [AA p. 000399]. Additional documents filed by the Plaintiff in support of the motion were a Reply Brief, filed on March 26, 2001, [AA p. 000508], and a REQUEST FOR JUDICIAL NOTICE TO MOTION TO AMEND COMPLAINT, ETC., filed Mar. 28, 2001 [AA p. 000519]. However, the Court denied the motion. [See Minute Order, AA p. 000556].

On the other hand, the Court did enter Judgment in favor of the KAISER Defendants, on May 29, 2001, the date of the hearing of the Motion to Amend. [AA p. 000556, and see Judgment at AA p. 000557]. The Notice of Appeal was filed by Plaintiff on May 7, 2001. [AA p. 000564].

STATEMENT OF APPEALABILTY

On May 7, 2001, the Plaintiff-Appellant filed a Notice of Appeal from the Judgment in favor of the KAISER Defendants dated March 29, 2001. [See AA p. 000557, et seq., for Judgment and see AA p. 000564, et seq., for Notice of Appeal]. [See *Code of Civil Procedure* §904.1, and §904.1(a)(1), in particular].

On September 5, 2000, Plaintiff-Appellant initially challenged the demurrer rulings as to the first three causes of action for religious discrimination (cause of action no. one for religious discrimination, cause of action no. two for failure to maintain a workplace free of discrimination and cause of action no. three for retaliation) by an extraordinary writ petition, which this court summarily denied on September 13, 2000 presumably because the Plaintiff had the right to file an appeal upon a Judgment being entered at the conclusion of this case (as Plaintiff/Appellant has now done). [Court of Appeals, Second Appellate District, Division Five, Docket No. B143989] Obviously, an order summarily denying a writ petition will not have law of the case effect, and the issue can be raised again on appeal. See *Kowis v. Howard* (1992) 3 Cal.4th 888, 894, 12 Cal.Rptr.2d 728, 731 and *Citizens for Open Access to Sand & Tide, Inc. v. Seadrift Ass'n* (1998) 60 Cal.App.4th 1053, 1064, 71 Cal.Rptr.2d 77, 84.

After initially proceeding on the remaining Tenth Cause of Action as to Kaiser, the Plaintiff voluntarily dismissed the remaining Tenth Cause of Action, with the express reservation that the remaining causes of action would be appealed. [AA p. 000372]. However, the dismissed cause of action was with prejudice so that that particular cause of action cannot be revived. An appeal may properly be enabled by stipulating to a dismissal of the remaining causes of action with prejudice, and allowing judgment to enter. [See *Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 308-309, 63 Cal.Rptr.2d 74, 87; *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1430, 77 Cal.Rptr.2d 574, 578].

Further, in multiparty actions, such as this one, a "piecemeal" Judgment that leave no issue remaining to be determined as to one or more of the parties is considered final as to those parties, and thus appealable. [*Justus v. Atchison* (1977) 19 Cal.3d 564, 567-568, 139 Cal.Rptr. 97, 99 (disapproved on other grounds in *Ochoa v. Super. Ct. (Santa Clara County)* (1985) 39 Cal.3d 159, 171, 216 Cal.Rptr. 661, 669); *Wells Fargo Bank v. California Ins. Guar. Ass'n* (1995) 38 Cal.App.4th 936, 941-942, 45 Cal.Rptr.2d 537, 540, fn. 5; *Millscap v. Federal Express Corp.* (1991) 227 Cal.App.3d 425, 430, 277 Cal.Rptr. 807, 810].

According to California Rules of Court, Rule 2, appeals must be filed the earlier of 1) 60 days after the mailing by the clerk of a notice of entry or file-stamped copy of a notice of entry; 2) 60 days after the service by any party of a notice of entry or file-stamped copy of the dismissal; or 3) 180 days after the date of entry. Becuase the Judgment was entered on March 29, 2001 [AA p. 000557], and the Notice of Appeal was filed on May 7, 2001 [AA p. 000564, et seq.], it is clear that the appeal was timely.

LEGAL DISCUSSION

I.

"ETHICAL VEGANISM" IS THE FUNCTIONAL EQUIVALENT OF A RELIGION AND/OR RELIGIOUS BELIEF UNDER THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT.

A. This Appears to Be a Case of First Impression for the Courts as to Whether Ethical Veganism Qualifies as a Religious Belief or The Legal Equivalent of a Religious Belief Under *FEHA* in an Area of Law, Discrimination, With a Public Policy of Remedying Discrimination.

The present case appears to be a case of first impression as to whether Ethical Veganism qualifies as a religious belief or the legal equivalent of a religious belief under *FEHA* in an area of law, discrimination, with a public policy of remedying discrimination.

While the issue of "what is a religion" is most known from the conscientious objector cases, there appears to be no known appellate case determining whether Ethical Veganism is a religion. In the conscientious objectors cases, the issue was whether forced military service violates a true religious belief, or whether the objector is simply alleging the belief as a ruse to avoid serving in the armed forces. See, for example, *United States v. Seeger* (1965) 380 U.S. 163, 13 L.Ed.2d 733, 85 S.Ct. 850. Apparently, the courts are not to test the "truth" or "validity" of an alleged religious practice, but to look instead to see if the person is feigning belief to avoid an otherwise legitimate obligation. Other than the Administrative Regulations [see AA p. 000309, AA pp. 000310-000311 and AA p. 000312], the only other known precedent directly on point, albeit, non-binding, is an EEOC Determination Letter holding Veganism to be the functional equivalent of a religious belief. [See AA pp. 000313-000314 for copy of EEOC Determination Letter]. The issue of whether Veganism or Ethical Veganism to be a religion appears never addressed other than in that EEOC Determination Letter on that one case. This issue is therefore ripe for consideration.

This appeal seeks to have this Appellate Court reverse and remand this case against the Kaiser Defendants by vacating the Judgment entered, including the two orders of July 7, 2000 and August 16, 2000, sustaining the demurrers including to the *FEHA* causes of action.

B. The Issue Is Whether Ethical Veganism is a Religious Belief Under the California Fair Employment and Housing Act.

1. Overview of Religious Belief Protections Under the Fair Employment and Housing Act.

An understanding of this matter requires a brief explanation of the religious belief protections under the *Fair Employment and Housing Act, Government Code* §12900, et seq., (sometimes herein referred to as "*FEHA*"), the broad and extensive types of damages awards allowed under *FEHA* (as opposed to a simple breach of contract or wrongful termination action), and the issue presented in this litigation.

Further, this case is primarily a religious discrimination and retaliation case under *FEHA* case under the *California Fair Employment and Housing Act, California Government Code* §12940, et seq., (referred to herein as "*FEHA*"). It is clear that the *FEHA* provides for the recovery of all forms of relief available in non-contract situations, including pain and suffering and punitive damages, which are not allowed in a mere contract action. [See *Commodore Home Sys., Inc. v. Superior Court* (1982) 32 Cal.3d 211, 215, 185 Cal.Rptr. 270; see also California Government Code §12965(b)]. This includes even the recovery of punitive damages through a private civil action brought under the *FEHA*. In fact, punitive damages may be assessed against an employer under California Civil Code §3294 without a showing that the employer itself is guilty of oppression, fraud, or malice. [See *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1153, 74 Cal.Rptr.2d 510].

As such, the damages allowed in a *FEHA* action are much broader than in a mere contract/wrongful termination action.

2. The Main Issue Presented is Whether "Ethical Veganism" Qualifies for California Employment Law Protections Prohibiting Religious Discrimination and Prohibiting Discrimination Based Upon Religions Practices.

This case presents an issue of first impression that is a matter of extreme public policy, as reflected by not only statute, i.e., the *FEHA,* but also by Constitutional protections. Both the California Constitution and the United States Constitution, Second Amendment, provide extensive protections to individuals based upon their religious beliefs. Protection of an individuals religious beliefs and reverse side of the coin, protection from discrimination on the basis of those beliefs, is of utmost fundamental importance in our Constitutional structure of government in this country. Therefore, this matter and the reach of religious belief protection is of extreme fundamental public policy. This public policy is reflected in the fact that while in ordinary breach of contract or wrongful termination cases, only economic damages are allowed, and such noneconomic damages as pain and suffering and punitive damages are not allowed, those noneconomic damages are allowed in discrimination cases, including religious discrimination cases.

The issue here is whether the provisions and protections of the *California Fair Employment and Housing Act ("FEHA")* apply to Ethical Vegans; Plaintiff/Appellant contends that they do, and for good reason, to protect not only his own beliefs, but those of all denominations and non-denominations of beliefs that are considered religious or the equivalent to the believer. A determination herein that Ethical Veganism is protected by the *FEHA* will protect everyone's right to be free from religious discrimination in the work place.

In this case, the trial court in essence "invited" petitioner to seek appellate review of this matter, as reflected in the trial court transcript. See lines 3 to 9, inclusive, of the Transcript, at Reporters Transcript (herein referred to as "RT"), p. C-3].

The facts are undisputed to some extent (the Plaintiff/Appellant is an Ethical Vegan and was terminated because he refused a vaccination based upon his Ethical Vegan beliefs), in part because this matter was determined on a

demurrer, the issue is purely legal (whether Ethical Veganism is a religious belief and/or the legal equivalent of a religious belief under the *FEHA*), and this issue is one of significant legal importance.

In this regard it should be noted that while the underlying trial court took the position on whether Veganism and Ethical Veganism were religious beliefs or the equivalent of religious beliefs under the *FEHA* by taking the position that they were not, it should be noted that the Plaintiff/Appellant contends that even if Veganism and/or Ethical Veganism are not per se protected by the *FEHA*, the Plaintiff/Appellant's beliefs and views must be viewed factually to determine whether they qualify as religious beliefs or the legal equivalent of religious beliefs based upon his sincerity of beliefs.

C. Ethical Vegan Beliefs Qualify for FEHA Religious Discrimination Protections.

The Kaiser Defendants/Respondents demurrered to the first, second and third causes of action essentially on the grounds that Ethical Veganism is not a religion under the anti-discrimination statutes. The Defendants/Respondents essentially admit in their memorandum of points and authorities that Plaintiff/Appellant pleads the elements of religious discrimination in his Complaint. Despite this, they make the contention, which apparently the court unfortunately agreed, that Ethical Vegans cannot ever be considered a religion or its equivalent under the anti-discrimination statutes. The Defendants/Respondents generally cite to Federal cases, although we are alleging State Court violations, in other Circuits and not on point at that. In fact the references to these cases are disingenuous and not analogous in the least. One of the cases cited, *United States v. Meyers*, 906 F.Supp. 1484, 1504 (D. Wy. 1995), aff'd, 95 F.3d 1475 (10th Cir. 1996), cert. denied, 522 U.S. 1006 (1997), which held that the beliefs held by the founder of the Church of Marijuana more accurately espouse a philosophy or way of life rather than a

religion, is not only merely a district court case, but it is based upon Federal law, not state, is out of district (California is in the 9th Circuit) and is based upon illegal conduct (marijuana usage), whereas the Plaintiff/Appellant FRIEDMAN's beliefs are clearly *not* illegal. It is disingenuous to compare beliefs in illegal activities (which anti-discrimination statutes do not protect) compared to the Plaintiff/Appellant's sincere Ethical Vegan belief in non-violence to animals of all kinds (which clearly is not illegal).

Plaintiff/Appellant's Ethical Veganism beliefs are sincere. They are not illegal. Plaintiff/Appellant's beliefs occupies the place of importance parallel to religion. It should be noted that "vegetism" is not the same as Ethical Veganism, let alone Veganism. Again, "vegetism" is not Veganism. The reason for this is "vegetism" does not include the moral and ethical components that Veganism includes. Further, Plaintiff/Appellant's views do fit the *Meyers* factors. Veganism and Ethical Veganism are not confined to one question alone, it is much broader. Vegans do not just eat vegetables (as under "vegetism"), but additionally such Vegan beliefs encompass all aspects of one's beliefs, from not only not eating meat, but not eating dairy products, not using soap derived from animal products, not wearing leather, wool, silk or other animal products, and, more to the point of this case, not getting vaccinated with vaccines made, derived or tested on animals. [See AA pp. 000002-000003].

All forms and aspects of religion, however eccentric, are generally included. *Cooper v. General Dynamics, Convair Aerospace Div.* (5th Cir. 1976) 533 Fed.2d 163, 168-169, *cert denied*, 43 U.S. 908 (1977). A religion does not require a formal organization or a "written form" to be protected by equal employment opportunity laws. [See *Brown v. Dade Christian Schools, Inc.* (5th Cir. 1997) 556 Fed.2d 310, 311-312, cert. denied, 434 U.S. 1063].

Further, it is not the case that only "institutional religions" are protected by the *FEHA* (and *Title VII*, as well).

Neither the case law, nor the Code and Regulations promulgated thereby, support such a position that only "institutional religions" are protected. It should be kept in mind that the various branches of the Protestant Christian churches, such as Methodist, Baptist, Lutheran, Episcopalian, Presbyterian, etc., at one time were *not* considered "institutional religions," with the Roman Catholic Church being the only "institutional" Christian religion, hence the term "Protestant," as in "protest."

A California tax case that set forth a very broad definition of religion and religious beliefs, *Fellowship of Humanity v. County of Alameda* (1957) 153 Cal.App.2d 673, 315 P.2d 394, has even been cited as authority in two U.S. Supreme Court cases. (See *School Dist. v. Schempp* (1963) 374 U.S. 203, 302, 10 L.Ed.2d 844, 903, 83 S.Ct. 1560, 1613, and *Torcaso v. Watkins* (1961) 367 U.S. 488, 495, 6 L.Ed.2d 982, 987, 81 S.Ct. 1680, 1684). This case included "Taoism, classic Buddhism, and Confucianism" as religions. Id., at pp. 684, 690. And also includes "humanists" and others that do not believe in "God or gods." Id., at pp. 680, 687 and 690. This case defined religion primarily in a constitutional setting, and should include the Plaintiff/Appellant herein's Ethical Vegan beliefs. However, the definition of religion in a anti-discrimination setting, such as *FEHA* here, should be broader than that in the constitutional (usually, Establishment Clause) setting in order to serve the differing public policy purpose of eliminating discrimination in the workplace.

In fact, the use of the term "creed" in addition to "belief or observance" or merely "religion" in the anti-discrimination *FEHA* statute could connote an intended broader interpretation for religion. See as an example the difference between *Government Code* §12940(a) using term "religious creed" as opposed to *Government Code* §12940(j) using term "religious belief or observance." Note also the broad definition in *Government Code* §12940(o), using terms "religious

creed," "religion," "religious observance," "religious belief," and "creed" to include "all aspects" of same.

Similarly, guidelines issued by the Internal Revenue Service to determine if an organization is organized and operated exclusively for religious purposes focus on a nonsecular definition of religion. The guidelines posit two basic questions: 1) Are the organization's beliefs truly and sincerely held by those professing them, as opposed to a mere sham, and 2) Are the practices and rites associated with the organization's belief or creed illegal or contrary to clearly defined public policy. If beliefs are truly and sincerely held, and practices do not violate law or clearly defined public policy, the Service will not question the religious nature of the organization's beliefs. [*I.R.S. Code* §[7.8.1]3.3.2 (1999)].

Neither of the cases cited by the Defendants/Respondents are applicable in the situation at bar. In fact, the analogies illustrate the same discriminatory perspective that Plaintiff/Appellant's religious beliefs were afforded. The Court in *Brown v. Pena,* F.Supp. 1382, 1384 (S.D.Fla. 1977), *aff'd* 589 F.2d 1113 (5th Cir. 1979), in an out of state, out of Circuit, decision, denied a prisoner's religious discrimination claim regarding his personal belief that eating cat food contributed to his well being. The Court found unique personnel preferences do not constitute a "religious belief." However, Ethical Veganism extends beyond trivial dietary preferences. Diet is merely a small part of observing a non-exploitive relationship with the people and animals of this world. Ethical Veganism is a relational "lense" through which to view the world. Ethical Vegans are not "speciesist" and value the sanctity of all life, seeking to exclude from their life, as far as possible and practical, all forms of exploitation of, and cruelty to, animals for food, clothing or any other purpose. Consequently, Ethical Vegans do not eat meat, fish or poultry, and do not use other animal products and by-products including eggs, dairy products, honey, leather, fur, wool, soaps and toothpastes which contain lard, etc., and Ethical

Vegans do not participate in the biomedical experimentation on animals and avoid activities or products which encourage it. As can be seen by this "list" of prohibited activities, being vegetarian is only one small part of being an Ethical Vegan. While being a Vegan or Ethical Vegan necessarily implies that one is a vegetarian, the opposite is not true; being a vegetarian does not imply one is an Ethical Vegan, let alone a Vegan. A recent poll estimates there are a half million Vegans in the continental United States.[3] There is a common ethical principle shared by all Vegans which is a reverence for life and desire to live with, as opposed to depend upon, the others species of the planet. Veganism is therefore not some bizarre trivial personal belief, but is a sincerely held set of moral and ethical values that rise to the level religious beliefs, and should be afforded religious protections as such.

1. Religious Discrimination Prohibitions In General.

Both *Title VII* of the *Civil Rights Act of 1964* and the *California Fair Employment and Housing Act, California Government Code* §12900, et seq. (hereinafter referred to as "*FEHA*") prohibit employment discrimination based on religion [see 42 *U.S.C.* § 2000e-2(a) *(Title VII)*; California Government Code §12940(a)-(d), (i), (j) *(FEHA)*]. Not only is religious discrimination in hiring, firing, compensation, and the terms, conditions, and privileges of employment unlawful [42 *U.S.C.* §2000e-2(a) *(Title VII)*; *Gov. Code* §12940(a) *(FEHA)*], but there is an affirmative duty on the employer to accommodate an individual's religious beliefs or observances [42 U.S.C. §2000e(j) *(Title VII)*; *Gov. Code* §12940(j) *(FEHA)*]. In this case, Plaintiff/Appellant has sued herein under *FEHA*.

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[3] A 1994 poll conducted by the Vegetarian Resource Group of 1,978 men and women reflects an estimated 500,000 Vegans in the United States. Debra Wasserman & Reed Mangels, *Vegan Handbook* at 229-230 (1996).

2. Definition of Religion Under *FEHA*.

"Religious creed," as it is used in the *FEHA*, not only includes any traditionally recognized religion, but also includes beliefs, observances, or practices that an individual sincerely holds and that occupy in his or her life a place of importance parallel to that of traditionally recognized religions. See 2 *Cal. Code Reg.* §7293.1, included at AA p. 000309.

California Government Code §12926(o), defines the religion terms as meaning that "'Religious creed,' 'religion,' 'religious observance,' 'religious belief, and 'creed' include all aspects of religious belief, observance, and practice." *California Government Code* §12935, regarding the "Functions, powers and duties of commission," provides that "The commission shall have the following functions, powers, and duties: (a) To adopt, promulgate, amend, and rescind suitable rules, regulations, and standards (1) to interpret, implement, and apply all provisions of this part, (2) to regulate the conduct of hearings held pursuant to Sections 12967 and 12980, and (3) to carry out all other functions and duties of the commission pursuant to this part."

Under the discrimination prohibitions of *FEHA*, *California Government Code* §12940(a), (b), (d) and (c), discrimination of an employee or applicant is unlawful if committed by an employer, labor organization, employment agency or apprenticeship programs or any program leading to employment. Further, an "employer" for the purposes of the *FEHA* prohibitions against discrimination is defined in California Government Code §12926(d), which defines an "employer" as an individual or entity (other than a nonprofit religious association or corporation) regularly employing five or more persons or "any person acting as an agent of an employer, directly or indirectly." See discussion in *Bee Hive Answering Serv.* (1984) No. 84-16 at 14, *FEHC Precedential Decisions* CEB 8 (Cal CEB 1984-1985), which held that a person

acting as an agent of an employer is a person who "significantly affects access to employment."

Pursuant to this authority, the Commission has defined "religious creed." 2 *Cal. Code Reg.* §7293.1, regarding "Establishing Religious Creed Discrimination," states, emphasis added, that "'Religious creed' includes any traditionally recognized religion as well as beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life *a place of importance parallel to that of traditionally recognized religions. . . .*" 2 *Cal. Code Reg.* §7293.3 likewise requires employers to "make reasonable accommodation to the known religious creed of an applicant or employee." A copy of this regulation is included at AA pp. 000310-000311. Even the under federal regulations, "religious practices" include moral or ethical beliefs about what is right and wrong that are sincerely held with the strength of traditional religious views [See 29 C.F.R. §1605.1, a copy included at AA p. 000312]. This regulation has even been used to show that even if no religious group espouses such beliefs, the belief can still be a religious belief of the employee or prospective employee, which would appear equally applicable under *FEHA.*

Clearly, under the regulatory definition, the Plaintiff/Appellant beliefs about ethical Veganism qualify as "religious creed." The Plaintiff/Appellant has plead that he "holds these beliefs with the strength of traditional religious views. . ." [Complaint, page 2, line 24, at AA p. 000002], and that "These are sincere and meaningful beliefs which occupy a place in the Plaintiff/Appellant's life parallel to that filled by God in traditionally religious individuals adhering to the Christian, Jewish or Muslim Faiths" [Complaint, page 2, line 28, to page 3, line 2; see AA pp. 000002-000003].

This is very important, when considered in conjunction with the legal proposition that an administrative agency's interpretation of its own regulation "deserves great weight." [*Culligan Water Conditioning v. State Bd. Of Equalization* (1976)

17 Cal.3d 86, 93]. "[T]he primary rule is to respect the subject matter expertise of the agency charged with enforcing the regulation and to defer to that agency's interpretation unless it is clearly erroneous or unauthorized." [*Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, 973-974]. Therefore, the Commission's administrative regulations holding that "'Religious creed' includes any traditionally recognized religion as well as beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life *a place of importance parallel to that of traditionally recognized religions. . . .*," "deserves great weight," and the Plaintiff's beliefs deserve such protections under the law and under these regulations. [See 2 *Cal. Code Reg.* §7293.3; see also *Culligan Water Conditioning v. State Bd. Of Equalization* (1976) 17 Cal.3d 86, 93].

2 *Cal. Code Reg.* §7293.1, continues by saying that "Religious creed discrimination may be established by showing: (a) Employment benefits have been denied, in whole or in part, because of an applicant's or employee's religious creed or lack of religious creed [or] (b) The employer or other covered entity has failed to reasonably accommodate the applicant's or employee's religious creed despite being informed by the applicant or employee or otherwise having become aware of the need for reasonable accommodation."

Further, in the *U.S. Equal Employment Opportunity Commission's (EEOC's)* Determination in *Anderson v. Orange County Transit Authority,* Charge No. 345960598, a copy of which is included at AA pp. 000313-000314. In *Anderson,* the *EEOC* determined that Anderson, was a "strict vegetarian due to moral and ethical beliefs as to what is right and wrong, and that he sincerely holds these beliefs with the strength of traditional religious views," was protected by the anti-religious discrimination statutes. Likewise, the Plaintiff/Appellant should be so protected by the anti-religious discrimination statutes here, too.

Thus it is clear that the Plaintiff/Appellant's ethical Vegan beliefs are protected under the anti-discrimination statutes protecting religious beliefs and creed. Even if the Court should find that Veganism is not a religion for all that practice it, the form of Ethical Vegan beliefs and practices of the Plaintiff/Appellant do qualifies as religious beliefs and creed under *FEHA*.

Thus it is clear that the Plaintiff's ethical Vegan beliefs are protected under the anti-discrimination statutes protecting religious beliefs and creed. Even if the Court should find that Veganism is not a religion for all that practice it, the form of ethical Vegan beliefs and practices of the Plaintiff do qualifies as religious beliefs and creed under *FEHA*. Furthermore, as to the retaliation cause of action, cause of action no. three, it should not matter whether Veganism is a religion or not. What matters is whether the Plaintiff reasonably believed it was a religion when he complained and protested about Kaiser not reasonably accommodating his Vegan beliefs.

II.
PLAINTIFF'S TORT CLAIMS ARE *NOT* PREEMPTED BECAUSE THE CONDUCT OF THE DEFENDANTS DOES NOT REASONABLY COME WITHIN THE "COMPENSATION BARGAIN."

A. In General.

The Defendants contend that the Plaintiff's causes of action for battery, invasion of privacy, negligence, battery/negligence per se for failure to obtain consent to medical experimentation, and intentional and negligent infliction of emotional distress are allegedly barred under the *California Workers' Compensation Act, California Labor Code* §§ 3600, *et seq.* However, the Defendants have failed to note that workers' compensation does *not* preempt an employee's claim for physical or emotional injury to which workers'

compensation applies if there is an express exemption, the injury is the result of conduct that does not reasonably come within the "compensation bargain," the injury is a result of conduct that "contravenes fundamental public policy," or the employee is not an employee at the time when the actionable conduct arises.

Defendants state in their points and authorities that "health care providers are required by law to conduct tuberculosis testing on certain employees . . . and that Kaiser has adopted a policy requiring **all** employees to submit to health appraisals, including tuberculosis testing." [Demurrer memorandum of points and authorities, page 8, lines 4 to 8, inclusive, at AA p. 000039]. However, it should be noted here that neither the administrative code they cited 22 Cal. Admin. Code §70723(b), nor any other statute, code or regulation, requires that the Plaintiff a *non-health care* employee, who did *not* work in a health care facility, from being tested, *nor for that matter is there any requirement in statute, code or regulation requiring Kaiser to immunize their employees.*

While the Defendants do not appear to be contending that workers' compensation would preempt the Plaintiff's *FEHA* claims, it should be noted that because statutorily prohibited discrimination is not a normal incident of employment, workers' compensation does *not* preempt claims brought under the *FEHA*. See *Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 353, 21 Cal.Rptr.2d 292. And since *Accardi* held that emotional distress claims caused by the employer's discriminatory practices are *not* barred by workers' compensation, clearly the Plaintiff's eighth and ninth causes of action for intentional infliction of emotional distress and negligent infliction of emotional distress, which both incorporate the prior causes of action, including the first cause of action for *FEHA* discrimination, the second cause of action for *FEHA* failure to maintain discrimination-free workplace and the third cause of action for *FEHA* retaliation, are not barred by workers' compensation. [See also *City of Moorpark v.*

Superior Court (1998) 18 Cal.4th 1143, 77 Cal.Rptr.2d 445, which held that *FEHA* claim for disability discrimination is *not* preempted by workers' compensation.] Likewise, the fifth cause of action for invasion of privacy, which is in part based upon the incorporation of these same *FEHA* allegations, should also not be preempted.

Additionally, the invasion of privacy cause of action, i.e., the fifth cause of action, is based primarily upon the "Plaintiff['s] right of privacy under the *United States Constitution*, [and] the *California Constitution*, Article 1, Section 1." [See Complaint, page 15, ¶81, lines 23 and 24]. As such an invasion of the Plaintiff right of privacy would be the result of conduct that "contravenes fundamental public policy." According to *Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 754, 7 Cal.Rptr.2d 808, injury that is the result of conduct that "contravenes fundamental public policy" is *not* preempted by workers' compensation. Likewise, violation of *California Heath and Safety Code* §§ 24170, *et seq.*, including §24175(a), §24173, §11525 and §11530, which requires the consent of all human subjects before medical experimentation can be performed on such human subjects, would "contravene fundamental public policy," and should therefore *not* be preempted by workers' compensation.

Further, injury that is a result of conduct that does not reasonably come within the "compensation bargain" does *not* preempt an employee's claims for physical or emotional injury. [See *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 276 Cal.Rptr. 303].

B. Plaintiff has set forth the Allegations for a Human Medical Experimentation Cause of Action.

There is no statute, code or regulation that requires Kaiser to test the Plaintiff who is *not* a health care employee and who does not work in a "health care facility." Further, there is no statute, code or regulation that requires Kaiser to immunize any of their employees. Therefore, Kaiser's

procedures, *when not involving proper informed consent*, amounts to a Human Medical Experiment in violation of *California Health & Safety Code* §24170, et seq., as set forth in the Plaintiff's Seventh Cause of Action. [See *Health & Safety Code* §§ 24174 and 24176]. Kaiser appears to have admitted that they are attempting to use this to determine whether it is the best procedure to keep healthy its health care employees. Further, while the Plaintiff never received the vaccination, he did receive the screening test that was a part of the procedure, and hence was made a part of the medical experiment.

III.

LEAVE TO AMEND WAS REQUESTED AT EVERY AVAILABLE OPPORTUNITY BY THE PLAINTIFF/APPELLANT, AND THE EXTENT THAT HIS PLEADINGS DO NOT PROPERLY SURVIVE A DEMURRER OR MOTION TO STRIKE, LEAVE TO AMEND SHOULD HAVE BEEN AFFORDED TO THE PLAINTIFF/APPELLANT.

Although the Plaintiff/Appellant believes that each of the two Demurrers and the Motion to Strike in issue should have been overruled and denied in their entirety, should the Plaintiff be mistaken and should the Court have properly sustained the Demurrer (or properly granted any Motion to Strike) in any respect, leave to amend should have been provided. "Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." [*Angie M. v. Sup.Ct. (Hiemstra)* (1995) 37 Cal.App.4th 1217, 1227, 44 Cal.Rptr.2d 197, 204]. In fact, it has been held to be an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action. [*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349, 134 Cal.Rptr. 375, 384; *Okun v. Sup.Ct. (Maple Properties)* (1981) 29 Cal.3d 442, 460, 175 Cal.Rptr. 157, 168]. Inasmuch as the complaint at issue as to the religious discrimination in

employment causes of action (causes of action one, two and three) were contained in the *original* Complaint when leave to amend was refused by the Court upon the Court's sustaining the original Demurrer by the Kaiser Defendants without leave, leave should have instead been granted. Likewise, as to the other causes of action which were only amended once.

While the Plaintiff/Appellant believes that the manner that he plead the first, second and third causes of action in the original Complaint to be sufficient to withstand the Kaiser Defendants' demurrers, it should be noted that in the First Amended Complaint the Plaintiff/Appellant used the term "Ethical Vegan" instead of merely "Vegan" because it more accurately describes his beliefs. See the "red-lined" version of the Complaint at AA p. 000224, et seq. To the extent that "Ethical Vegan" beliefs would qualify as a religious belief, but a "Vegan" belief would not, leave should have been provided by the Court to the Plaintiff at the initial Demurrer hearing, as well as at the Motion to Amend and for other relief that was held in March 2001. Note that the trial court had barred the Plaintiff/Appellant from pleading the first, second and third causes of action of the First Amended Complaint against the Kaiser Defendants/Respondents. [See Order Sustaining Demurrers, at AA p. 000163, et seq.]

At the Motion to Amend and for other relief in March 2001, the Plaintiff requested in part an order vacating disqualified Judge Sohigian's prior rulings based upon his ownership in stock of one of the defendants. While this could provide an independent basis to set aside the Judgment in this matter and remand, more importantly, it provides additional good cause for allowing leave to amend pursuant to *California Code of Civil Procedure* §473, which was requested at each Demurrer hearing as well as the formal Motion for Leave to Amend and other relief held in March 2001. Upon a showing of "good cause," the prior rulings made by a disqualified judge may be set aside by the judge who replaces the disqualified judge. *Code of Civil Procedure* §170.3(4). Therefore,

based upon a showing of "good cause" the prior sustaining of the demurrers and motions to strike should be set aside by this Court as good cause is shown herein. Further, a Court has the *inherent power* to reconsider a prior order *sua sponte* and enter a new and different order at any time prior to entry of judgment. [*Darling, Hall & Rae v. Kritt* (1999) 75 Cal.App.4th 1148, 1156-1157, 89 Cal.Rptr. 676, 682]. In fact, *Code of Civil Procedure* §1008 does *not* limit the Court's *inherent power* to reevaluate its interim rulings on its own motion, and to enter a new and different order any time prior to entry of judgment. [*Darling*, id.]. The lower Court should have done so in this case.

A. Amendments to Complaints Should Be Allowed "In The Furtherance of Justice" And to Allow All Disputes Between The Parties to Proceed to Trial.

Furthermore, even if good cause for the setting aside of the prior sustaining of the demurrers and motions to strike was not shown, the Court still should have allow leave to amend the Complaint, as the granting of leave to amend is always within the discretion of the trial court, even up to and including during the time of a trial. [*Lilley v. Key System Transit Lines* (1955, 1st Dist.) 136 Cal. App. 2d 737, 189 P.2d 517 (permitting plaintiffs to amend complaint during rebuttal is not abuse of discretion where defendant shows no prejudice, does not ask for continuance, but merely objects to the motion as being "untimely.")]. In our case, leave to amend was requested at every available opportunity. Therefore, leave to amend should be granted in any event.

"The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding . . . The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars . . . " [C.C.P. § 473]. It is judicial policy to resolve all disputes between the parties on their merits, and to

allow amendment of the pleadings to put all such disputes at issue at the time of trial. "While a motion to permit an amendment to a pleading to be filed is one addressed to the discretion of the court . . . it is a rare case in which a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case . . . If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error, but an abuse of discretion." [*Calif. Cas. Gen. Ins. Co. v. Sup.Ct. (Gorgei)*, (1985) 173 Cal.App.3d 274, 278, 218 Cal.Rptr. 817, 819 (emphasis added).] Here, none of the proposed amendments will prejudice the defendants.

"Trial courts are vested with the discretion to allow amendments to pleadings in furtherance of justice . . . That trial courts are to liberally permit such amendments, at any stage of the proceeding, has been established policy in this state . . . resting on the fundamental policy that cases should be decided on their merits." *[Hirsa v. Superior Court (Vickers)*, (1981) 118 Cal.App.3d 486, 173 Cal.Rptr. 418.]

B. The Proposed Amendments were "In the Furtherance of Justice."

Contrary to what the Defendants assert in their Oppositions, it is in fact relevant that the "Ethical Vegan" beliefs qualify for religious discrimination protections under the *Fair Employment and Housing Act ("FEHA")*. The principal purpose of vesting the Court with the discretionary power to correct "a mistake in any other respect" is to enable it to mold and direct its proceedings so as to dispose of cases upon their substantial merits, when it can be done without injustice to either party, whether the obstruction to such a disposition of cases be a mistake of fact or mistake as to the law, although it may be that the Court should require a stronger showing to

justify relief from the effect of a mistake of law than a mistake of fact. *Ward v. Clay* (1890) 82 Cal. 502, 23 P. 50.

Further, the original demurrer was to a Complaint that plead "Vegan beliefs" rather than "Ethical Vegan beliefs." This factual change might be significant. Ethical Veganism is a sincerely held set of moral and ethical values that rise to the level religious beliefs, and should be afforded religious protections as such.

One Court held that it did not exhaust its power to grant leave to file amended pleading by denying application at trial, and it may, on motion for new trial, consider that contrary ruling would be proper. *Mercantile Trust Co. v. Sunset Road Oil Co.* (1917) Cal. 461, 168 P. 1037. Similarly, a Court does not exhaust its power to grant leave to file an amended Complaint by denying request in opposition to a demurrer, and it may, on a later motion, consider that a contrary ruling would be proper. Further, a Motion to Amend a Complaint pursuant to *Code of Civil Procedure* §473, even after Judgment has been entered pursuant to the sustaining of a Demurrer, can be made under the relief provisions of this section. *Risco v. Reuss* (1941) 45 Cal. App. 2d 243, 113 P.2d 914. Further, it has been held that a motion for leave to amend a Complaint made within a reasonable time after the sustaining of a Demurrer without leave to amend can be properly granted. *Carter v. Shinsako* (1940) 42 Cal. App. 2d 9, 108 P.2d 27. While one case held in the absence of showing of excuse for delay, it is not abuse of discretion to deny motion to restore to complaint a count to which demurrer has been sustained with leave to amend, where motion was made at opening of trial more than year after demurrer was sustained, in our case the delay was reasonable. *Curtis v. Twentieth Century-Fox Film Corp.* (1956, 2nd Dist.) 140 Cal. App. 2d 461, 295 P2d 62. In terms of Plaintiff's reasonableness in not making this motion earlier, note that a Plaintiff may assume that further motion to amend complaint would be futile where a Judge adopted defendant's

view that pleadings could not be amended to state cause of action. *Carney v. Simmonds* (1957) 49 Cal. 2d 84, 315 P.2d 305.

One case has held that it was error for trial court after having sustained demurrer without leave to amend to deny his motion for leave to amend, denial being based on theory that court had lost jurisdiction to allow amendment by its previous order. *Frantz v. Mallen* (1928) 204 Cal. 159, 267 P. 314. While, denial of a motion to amend a complaint made after judgment on the pleadings was not an abuse of discretion, where the plaintiff failed to show that it could be amended to state a cause of action, in our case amendment can cure any defect, if any, and/or strengthen the Complaint from attack. *Irvine v. J. F. Shea Co.* (1940) 41 Cal. App. 2d 458, 107 P.2d 80.

The following were the proposed changes to the religious discrimination causes of action (one, two and three), as they relate to the Kaiser defendants:

- Where ever the term "Vegan" appeared in the Complaint it was replaced with "Ethical Vegan," in the First Amended Complaint. [See redlined copy of First Amended Complaint lodged/filed with the Court at the time of filing the First Amended Compliant, at AA p. 000224, et seq.]. This may be a significant change in the Complaint that the Court has never ruled upon as it applies to the KAISER defendants. While the Plaintiff believes that "Vegan" beliefs are entitled to the State's *Fair Employment and Housing Act ("FEHA")* religious anti-discrimination, it is more so with regard to the Plaintiff's "Ethical Vegan" beliefs, which are stronger beliefs than just "Vegan" beliefs.

Further, the following are the proposed additional changes to those religious discrimination causes of action (one, two and three), which are the redlined portion of the Second Amended Complaint, likewise as they relate to the Kaiser Defendants:

- Insert that it is plead against the KAISER defendants as to causes of action one, two and three. [Redlined copy

of Complaint attached to original Declaration in support of motion, previously filed, page 11, line 11, page 15, line 19 and page 16, line 21, see AA p. 000415, et seq.];

- Also, as to the religious discrimination retaliation cause of action (no. three), the Plaintiff wants to plead that not only did "he complain about religious discrimination," but also that he "protested about religious discrimination." [AA p. 000415, et seq., see proposed amended complaint, Page 16, line 28 to page 17, line 1].
- Further, as to the religious discrimination retaliation cause of action (no. three), the Plaintiff additionally requested to plead that "Plaintiff reasonably believed that Ethical Veganism was a religion and/or his Ethical Vegan practices constituted a religious observance and/or practice when he complained and protested about KAISER not reasonably accommodating his Ethical Vegan beliefs and/or practices, as set forth above." In this regard, both in terms of whether Ethical Veganism is the equivalent of a religion, but also whether such a belief would be reasonable, note that the *Equal Employment Opportunity Commission ("EEOC")* has actually held and made a determination in another case that they considered it to be the equivalent of a religion. [See AA p. 000313-000314].

While the Plaintiff does not believe that any motion to strike that may have been heard to be meritorious in any respect, should the Plaintiff be mistaken, and any the motion to strike had been granted in any respect, leave to amend had been requested and should be given. It has been held that failure to allow leave to amend is an abuse of discretion. [See *California Code of Civil Procedure* §472a(d); *Vaccara v. Kaiman* (1998) 63 Cal.App.4th 761, 768-769, 73 Cal.Rptr.2d 829, 833-834 (citing text)]. Further, the same liberal policy regarding amendments of pleadings on sustaining of demurrers applies

here, too. Therefore, as long as any defect is correctable, an amended pleading will usually be allowed. [See *Grieves v. Sup.Ct. (Fox)* (1984) 157 Cal.App.3d 159, 168, 203 Cal.Rptr. 556, 561, which relied on *California Code of Civil Procedure* §576, which authorizes the Court to allow amendments of pleadings at any time "in the furtherance of justice."].

CONCLUSION

For the reasons stated, petitioner JEROLD DANIEL FRIEDMAN, also known as JERRY FRIEDMAN, respectfully requests this court to hold that "Ethical Veganism" to be a religion and/or a religious belief, or the functional equivalent of same, under California employment law with regard to the California *Fair Employment and Housing Act*, and for this reason and the other reasons set forth above, to vacate the Judgment and the sustaining of the Demurrers below, and to reverse and remand this case for further proceedings, including directions requiring the lower Court to allow leave to amend.

Dated: October 9, 2001

Respectfully submitted,
/s/ Scott D. Myer

BY: SCOTT D. MYER, ESQ.
MYER LAW FIRM,
Attorney for Petitioner,
JEROLD DANIEL FRIEDMAN, also known as JERRY FRIEDMAN

ATTORNEY'S CERTIFICATE OF SERVICE BY MAIL

[Code Civ. Proc. § 1013a(2)]

I, SCOTT D. MYER, certify:

I am, and at all times mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is Myer Law Firm,

11040 Santa Monica Boulevard, Suite 320, Los Angeles, CA 90025-7515.

I served the attached **APPELLANT'S OPENING BRIEF**, on October 9, 2001, by depositing a copy of the document in the United States mail at City of Los Angeles, County of Los Angeles, State of California, in a sealed envelope, with postage fully prepaid **PRIORITY MAIL**, addressed to:

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LOS ANGELES SUPERIOR COURT
Hon. Cesar C. Sarmiento, Judge
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(Court Appealed From)

LOS ANGELES SUPERIOR COURT
Hon. Ronald M. Sohigian, Judge
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111 North Hill Street
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(Court Appealed From)

who are the attorneys of record for the Defendants, the Court appealed from and the Supreme Court. At that time

there was regular delivery of United States mail between the place of deposit and place of address.

Dated: October 9, 2001 /s/ Scott D. Myer

SCOTT D. MYER, ESQ.

APPELLANT'S PETITION FOR REHEARING TO COURT OF APPEAL

Appeal No. B150017
(Prior Appellate Matter: B143989)
(Related Appellate Matter: B155272)

IN THE COURT OF APPEALS
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

COURT OF APPEALS - SECOND DIST.
FILED
OCTOBER 1 2002
JOSEPH A. LANE Clerk
J. BELCHER
Deputy Clerk

JEROLD DANIEL FRIEDMAN,
also known as JERRY FRIEDMAN,
Plaintiff and Appellant,
vs.
SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, a California partnership; KAISER FOUNDATION HOSPITALS, a California corporation; KAISER FOUNDATION HEALTH PLAN, INC., a California corporation,
Defendants and Respondents.

From The Superior Court for Los Angeles County
Hon. Cesar C. Sarmiento, Judge
and
Hon. Ronald M. Sohigian, Judge
Superior Court Case No. BC224249

APPELLANT'S PETITION FOR REHEARING

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Appeal No. B150017
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IN THE COURT OF APPEALS
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DIVISION FIVE

JEROLD DANIEL FRIEDMAN,
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Defendants and Respondents.

APPELLANT'S PETITION FOR REHEARING

INTRODUCTION

This court's opinion for the first time sets forth a definition in California for a religion under the *California Fair Employment and Housing Act ("FEHA").* Therefore, at no time did the Plaintiff have the benefit of this definition when pleading his case. At a minimum, this case should be remanded to the Superior Court to allow the Plaintiff to plead his religious discrimination *FEHA* claim under this new definition of "religious creed." Further, this court's opinion is predicted on the erroneous assumption that the Plaintiff did not allege facts satisfying the court's new definition of "religious creed" and that the Plaintiff's Ethical Vegan beliefs do not "occupy in his . . . life a place of importance parallel to that of traditionally recognized religions . . ." As we demonstrate below, the Plaintiff did in fact allege facts that satisfied the court's new definition and the Plaintiffs' Ethical Vegan beliefs do in fact "occupy in his . . . life a place of importance parallel to that of traditionally recognized religions . . ." . Further, even if the Plaintiff did not satisfy this new definition, a definition that the Plaintiff could only speculate or guess as to at the time he plead his case, equity and fairness dictate that the Plaintiff be allowed the opportunity to plead

his case under the newly stated definition of "religious creed."

Further, with regard to the other non-discrimination causes of action, i.e., the personal injury causes of action, this court's opinion is predicated on the erroneous assumption that the Plaintiff did not plead delayed discovery of the grounds for his personal injury claims. As we demonstrate below, the Plaintiff did in fact plead delayed discovery.

Therefore, the court should grant rehearing.

LEGAL DISCUSSION

1. The Plaintiff Has Reasonably Pled The Requirements of "Religious Creed" Discrimination Under The Court's New Definition.

While the Court acknowledges that this was a case of first impression as to what the definition of "religious creed" was under the *FEHA*, [Opinion ("Opn."), p. 6, §2, 1st ¶], the Plaintiff has already plead, or it can be considered reasonably plead when the complaint is viewed in a reasonable light most favorable to the Plaintiff, the requirements under such a definition.

The several tests mentioned in the opinion culminate in this court's conclusion, which is Judge Adams' three-prong test, beginning on page 34. [Opn., 34-36] "First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters." While this may not be simple veganism, it is Ethical Veganism. Ethical Veganism asks what is the ultimate meaning of life and concludes veganism in the broadest sense, compassion for all life, amelioration of suffering, advocacy of happiness and cooperation. The query and conclusion makes it ethical. These are similar core tenets to Quakers and Buddhists and countless other denominations of a myriad of religions. While the foundation is not on a supreme being as the Quakers rely upon, it rests on a philosophy revealed by Peter Singer much

like Buddhism was a philosophy revealed by Siddhartha. "Imponderable matters" is a strange qualifier as members of all sorts of traditional religions would claim their religion is ponderable--able to be precisely evaluated. Not that they would necessarily claim they would succeed. There are, for example, Christians who rely heavily on faith and those who rely heavily on formal logic, and that is why there are Christian scholars. The former claim religion is imponderable, the latter do not. If the court is asking for epistemology, the elemental meaning of Ethical Veganism, it may very well be imponderable depending on who is asked. Importantly, it should be noted that the court incorrectly states that "There is no apparent spiritual or otherworldly component to plaintiff's beliefs." [Opn., p. 35]. Yet, the court earlier in its opinion cites to just such allegations contained in the Plaintiff's complaint, that "He lives each aspect of his life in accordance with this system of ***spiritual beliefs***[, and] [t]his belief system[] guides the way that he lives his life[, and] [Plaintiff's] beliefs are ***spiritual*** in nature and set a course for his entire way of life[, and] he would disregard elementary self-interest in preference to transgressing these tenets." [Opn., p. 3, emphasis added; See also Appellant's Appendix ("AA"), p. 000002-000003, ¶4]. Further, in the complaint as quoted in the opinion [Opn., pp. 3-4 See also AA, p. 000002-000003, ¶4], "violating natural law, foundational creeds, beliefs spiritual in nature, disregarding elementary self-interest, guiding the way I live my life" are all fundamental. "Natural law, foundational creeds, and beliefs spiritual in nature" are addressing ultimate questions. "Natural law, spiritual beliefs" are matters addressing deep and imponderable matters. Plaintiff has therefore satisfied the first prong of this court's new definition of religious creed.

"Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching." The distinction between "comprehensive nature" and "an isolated teaching" is a question of fact. Taoism, for example, has the isolated teaching of balance which is applied

comprehensively to the universe. Otherwise, is the court claiming that simple religions are unreasonable because they are not complicated? This would topple any new religion because traditional religions have hundreds or thousands of years to become comprehensive. This may be an unconstitutional test of reasonableness. Ethical Veganism is comprehensive to the Plaintiff, extending to every aspect of his life, even his dreams. A nonvegan may not think it is comprehensive, but that could also apply to others' views of anyone else's religion. Since the Plaintiff's Ethical Vegan belief system encompasses all aspects and elements of not only his life, but the lives of all animals, the belief system is comprehensive and satisfies the second prong of this court's requirements for a religious creed.

"Third, a religion often can be recognized by the presence of certain formal and external signs." This again is biased against new religions and may also be an unconstitutional test of reasonableness. Even so, some Ethical Vegans recognize Gandhi's birthday (October 2nd) as a holiday, and World Vegan Day is November 1st. Further, Peter Singer may be considered a founder of the compiled philosophy and may have many teachers, the equivalent of "ministers." In fact, if the Plaintiff were allowed to amend his complaint, he could plead that in both Massachusetts and California, legal marriages licenses have been issued with the marriage being performed by an Ethical Vegan. There are vegan songs, heroes, and many of us aim to convert others to Ethical Veganism. In this sense, Ethical Veganism is evangelical or proselytizing as are many Christian religions. The Plaintiff can allege that he has a tattoo on his left arm symbolizing Ethical Veganism, as some Christians would tattoo a crucifix. In terms of what the Plaintiff already pled in his complaint–Plaintiff pled his diet (setting forth what he cannot eat under Ethical Veganism) and clothing (setting forth what he cannot wear under Ethical Veganism) are traditional "formal and external signs" of religion. Similarly, the civil

disobedience comparison to Operation Rescue is an external sign of religious faith and devotion to these values, or the great sacrifice Jehovah's Witnesses are known to take to retain their religious purity. [AA, pp. 000002-000003, ¶4].

2. Even If the Appellant Did Not Plead the Elements of the New Definition of "Religious Creed," as this Was a Case of First Impression, the Appellant Should Have Been Afforded Leave to Amend upon Remand to Allow Him to Plead His Case under the New Definition That the Court Has Set Forth in the Decision.

At the trial court level, the trial court provided no leave to amend the complaint after dismissing the religious creed discrimination causes of action. [AA, pp. 000161-000162 and AA, pp. 000163-000170]. As this court noted, this is a case of first impression as to defining religious creed under the *FEHA*. [Opn., p. 6, §2, first ¶]. Prior to dismissing the religious creed discrimination claims in the complaint, the trial court should have provided guidance in terms of what the court considered to be required in what this court even admits to be a murky area of defining what is a religion. The Ninth Circuit Court of Appeals held in *Bautista v. Los Angeles County,* 216 Fed.3d 837 (9th Cir. 2000), that a District Court must provide guidance to the Plaintiff and her counsel prior to dismissing with prejudice. Such logic would seem especially necessary in situations such as this where the rule of law has yet to be formulated by the courts. Further, the courts of this state have held that "Trial courts are vested with the discretion to allow amendments to pleadings in furtherance of justice . . . That trial courts are to liberally permit such amendments, at any stage of the proceeding, has been established policy in this state . . . resting on the fundamental policy that cases should be decided on their merits." *[Hirsa v. Superior Court (Vickers),* (1981) 118 Cal.App.3d 486, 173 Cal.Rptr. 418.] Likewise, when

a new rule of law sets forth the legal requirement of pleading at the appellate level, justice should require that the case be remanded back to the trial court in order to determine whether the Plaintiff can plead the elements of that new rule of law.

Further, what is troubling is the way that the court has given short shrift to the Plaintiff's request to amend his complaint from "vegan" to "Ethical Vegan." In that the court's second requirement for religious creed includes a "belief-system," [Opn., p. 35], such an amendment to allege an "Ethical Vegan" belief-system seems to be an important amendment indeed. The one-paragraph discussion of "Leave to Amend" in the opinion seems lacking and misses the point of the amendment. [Opn., 36-37]. The amendment to change "vegan" to "Ethical Vegan" is intended to show that this Plaintiff's views (as well as others who belief in Ethical Veganism, as opposed to mere veganism), encompass a comprehensive belief-system.

Furthermore, now that this court has set forth a rule of law as to determining what a religion for the purposes of the *FEHA*, equity and the maxim that all cases should generally be tried on their merits requires that this case be remanded to the trial court with instructions to allow the Plaintiff leave to attempt to amend his religious creed discrimination claims, should the court still believe that the Plaintiff has not adequately pled his claims.

3. The Court's Rule of Law Violates the Establishment Clause, Especially in Light of the Fact That the Determination of Whether the Plaintiff's Ethical Vegan Beliefs Were a "Religious Creed" Were Determined by Demurrer, Rather than by a Fact-finder after Expert Testimony Religious Scholars.

The court's rule of law violates the Establishment Clause, especially in light of the fact that the determination of whether the plaintiff's Ethical Vegan beliefs were a "religious

creed" were determined by demurrer, rather than by a fact-finder after expert testimony religious scholars. The case should have gone to a jury (or at a minimum, a judge on summary judgment), to determine factually whether the Plaintiff's Ethical Vegan beliefs qualify as a "religious creed" for *FEHA* purposes.

Starting on page 31 [Opn., p. 31], this court says the trend is to define religion more narrowly by comparing proclaimed religions to traditional religions. This is a possible violation of the Free Exercise and Establishment Clause. "Free Exercise" is not intended to only apply to "traditional religions," which at one point did not even include the Protestant Church, hence the name "Protest"-ant. Further, the court therefore favors traditional religions and disfavors non-traditional religions, a violation of the Establishment Clause which is to give no preference. Indeed, the government can only test sincerity, not reasonableness; otherwise, the court is saying that traditional religions are reasonable and untraditional religions are not. On page 32 [Opn., p. 32], "a place of importance parallel to that of traditionally recognized religions"--again may violate the Establishment Clause setting up what is a reasonable religion and those that are not reasonable (according to the court) are not considered religions. However, Plaintiff has in any event, pled and satisfied this "requirement."

The court's definition of religion is heavily biased in favor of Western religions. It is questionable whether Taoism, classic Buddhism or Confucianism could satisfy the court's requirements of "religious creed," as set forth in the opinion of this court. And, if as it should be, Confucianism is considered a religious creed, so too should Ethical Veganism. Ethical Veganism has been around at least since 4 B.C.E. as practiced by Apollonius of Tyana -- who wore bark for sandals, refused meat and all animal products, even refusing a wax sculpture tribute to him because it came from bees. Modernly, Peter Singer (a Princeton professor of ethics) consolidated several

philosophies about what it means to be human in the sense of our moral obligations. These writings have become the religious tenets of millions of Americans and others. Under Apollonius or Singer, Ethical Veganism is perfectly analogous to Confucianism, and should be considered a religion.

Both the trial court and this court should not have tested the reasonableness of Plaintiff's religion through the above test. At a minimum, the issue of whether or not the Plaintiff's Ethical Vegan beliefs are a "religious creed" should have been decided by a trier of fact, not as a matter of law on a demurrer.

4. The Court Should Have Construed California "Religious Creed" Discrimination Protections Broader than Federal Protections, Not Narrower.

Although the court notes that "California courts have consistently looked to federal authority," [Opn., p. 10], the court opines that *California Code of Regulations*, Title 2, Section 7293.1 cannot be construed as broadly. [Opn., 21-22]. This overlooks the fact that California anti-discrimination protections are generally interpreted more broadly than the federal interpretations, and when the court's do not follow this principal, the Legislature overrules the courts. [See as example *Government Code* §12941.1, rejecting the decision of *Marks v. Loral Corp.* (1997) 57 Cal.App.4th 30; See also, *Government Code* §12940(j), in particular §12940(j)(3), amended to reject the no co-worker liability rule in *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132 (1999)]. The legislative intent is thus that *Government Code* §12940 should be interpreted broadly to provide the greatest possible protection for employees and applicants.

Thus, the court should have construed California "religious creed" discrimination protections broader than federal protections, not narrower.

5. **Contrary to the Court's Decision, the Plaintiff's Tort Claims Are Not Subject to the Statute of Limitations Because Plaintiff Alleged Delayed Discovery and Delayed Accrual of His Causes of Action.**

With regard to the non-discrimination causes of action, i.e., the personal injury causes of action, this court's opinion is predicated on the erroneous assumption that the Plaintiff did not plead delayed discovery of the grounds for his personal injury claims. [Opn., pp. 39-40, §D.2.]. Contrary to this statement in the Opinion, the Plaintiff did in fact allege delayed discovery and delayed accrual of his personal injury causes of action in his First Amended Complaint. [AA, pp. 000172-000199]. In particular, in the First Amended Complaint, page 10, lines 5-10, ¶50, the Plaintiff alleged:

> "50. In or about July 1999, while researching medical issues related to the discrimination aspects of this case, the Plaintiff first became aware that the TB test performed on the Plaintiff previously on or about March 20, 1998, included injecting the Plaintiff with bovine (cow) serum. Based upon this knowledge that he had been unwittingly injected with bovine (cow) serum during the TB test believing it to be Vegan "friendly" the Plaintiff suffered further emotional distress and medical symptoms as a result of such knowledge."
>
> [AA, p. 000181, lines 5-10].

As can be seen, the Plaintiff is not subject to the statute of limitations on his personal injury claims based upon delayed discovery and delayed accrual of his personal injury causes of action, because of the July 1999 accrual date.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this court grant rehearing, either holding that Veganism or Ethical Veganism is the equivalent of a religious creed or to remand this case to the Superior Court to allow the Plaintiff to plead his case of religious creed discrimination under this court's new standard.

Dated: September 30, 2002 Respectfully submitted,
/s/ Scott D. Myer

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 14(c)(1))

The text of this petition consists of **3227 words** as counted by the Corel WordPerfect version 8 word-processing program used to generate the brief.

Dated: September 30, 2002 /s/ Scott D. Myer

BY: SCOTT D. MYER, ESQ.
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ATTORNEY'S CERTIFICATE OF SERVICE BY MAIL

[Code Civ. Proc. § 1013a(2)]

I, SCOTT D. MYER, certify:

I am, and at all times mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is Myer Law Firm,

11040 Santa Monica Boulevard, Suite 320, Los Angeles, CA 90025-7515.

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who are the attorneys of record for the Defendants, the Court appealed from and the Supreme Court. At that time

there was regular delivery of United States mail between the place of deposit and place of address.

Dated: September 30, 2002 /s/ Scott D. Myer
SCOTT D. MYER, ESQ.

PETITION FOR REVIEW
TO CALIFORNIA SUPREME COURT

Supreme Court No. S110916
[2nd District No. B150017]

IN THE
SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
OCT 23 2002
Frederick K. Ohlrich Clerk
Deputy

JEROLD DANIEL FRIEDMAN,
also known as JERRY FRIEDMAN,
Plaintiff-Appellant-Petitioner,
vs.
SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, a California partnership; KAISER FOUNDATION HOSPITALS, a California corporation; KAISER FOUNDATION HEALTH PLAN, INC., a California corporation,
Defendants-Respondents.

After a Decision By the Court of Appeal,
Second Appellate District, Division Five
Case No. B150017

PETITION FOR REVIEW

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[2nd District No. B150017]

IN THE
SUPREME COURT OF CALIFORNIA

JEROLD DANIEL FRIEDMAN,
also known as JERRY FRIEDMAN,
Plaintiff-Appellant-Petitioner,
vs.
SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, a California partnership; KAISER FOUNDATION HOSPITALS, a California corporation; KAISER FOUNDATION HEALTH PLAN, INC., a California corporation,
Defendants-Respondents.

PETITION FOR REVIEW

ISSUES PRESENTED

1. What is the legal standard or definition of a religious belief or creed under the *California Fair Employment and Housing Act* ("*FEHA*"), [*Government Code* §12900, et seq.]? Does a vegan or an Ethical Vegan belief system qualify as a religious belief or creed, or the legal equivalent thereof, under the *FEHA*, for the purposes of employment law protections in California?

2. When a court sets a new legal standard or definition, as the Court of Appeal admittedly did in this case, defining "religious creed" under the *FEHA*, should leave to amend be provided to the Plaintiff, especially when the Plaintiff requested such leave in the trial court and the trial court refused to provide such leave to amend?

WHY REVIEW SHOULD BE GRANTED

Historically, there has always been much confusion regarding what is and what is not a religion under the law, both State and Federal. Further, the Court of Appeal here was the first court to set forth a definition in California for a religion under the *FEHA*.

Although, the *United States Equal Employment Opportunity Commission* ("EEOC") issued a *Determination* in a case that essentially said that Veganism is the equivalent of a religious belief under *Title VII of the Civil Rights Act of 1964*, as amended, prior to this case herein, [See Determination at AA p. 000313-000314], there is no known case dealing directly with Veganism or Ethical Veganism as a religious belief or creed. However, there is a Canadian case that held that a prisoner who held a belief that "consumption of animal products is morally wrong" can be protected under a "freedom of conscience," equivalent to a freedom of religion. That case stated that "Motivation for practi[c]ing vegetarianism may vary, but, in my opinion, its underlying belief system may fall under an expression of 'conscience.'" [*Jack Maurice v. Attorney General of Canada*, 2002 FCT 69 (Docket T-1487-99) (Decided January 21, 2002), <http://decisions.fct-cf.gc.ca/fct/2002/2002fct69.html>].

The Court of Appeal's new definition of "religious creed" under the *FEHA* has several problems, including that it tests the reasonableness of the adherent's beliefs, which runs against the United States and California Constitutions' Establishment and Equal Protection Clauses. A more appropriate test or standard can be derived from the conscientious objector cases, such as *United States v. Seeger* (1965) 380 U.S. 163, 13 L.Ed.2d 733, 85 S.Ct. 850.

Even if the Plaintiff did not satisfy the Court of Appeals new definition of religion or religious creed, a definition that the Plaintiff could only speculate or guess as to at the time he plead his case, equity and fairness dictate that the Plaintiff be allowed the opportunity to plead his case under the newly stated definition of "religious creed." At no

time did the Plaintiff have the benefit of this definition when pleading his case. It is important policy of this State that cases be tried on their merits. There should be a uniform statewide standard that when an area of the law is unclear, as it is or was in this case with regard to the definition of religion or religious creed under the *FEHA*, at the time that a Plaintiff pleads his or her case initially, that said Plaintiff should be provided at least one opportunity to amend his or her complaint. In this case, the Plaintiff was never allowed an opportunity to amend his complaint as to the religious discrimination causes of action at issue. At a minimum, this case should be remanded to the Superior Court to allow the Plaintiff to plead his religious discrimination *FEHA* claim under this new definition of "religious creed."

Therefore, this Court should grant hearing in this matter because such review is "necessary to secure uniformity of decision or the *settlement of important questions of law.*" [See *California Rules of Court* 29(a)(1), emphasis added]. In this regard, the settlement of the definitions of "religion" and "religious beliefs" and "religious creed" under the *FEHA* are important questions of law.

BACKGROUND

This appeal arose from a Judgment [See Appellant's Appendix in Lieu of Clerk's Transcript (hereinafter, referred to as "AA"), p. 000557, et seq.], incorporating the sustaining of two Demurrers [See AA p. 000163, et seq., and AA p. 000342, et seq.], and the denials of a Motion and Requests for Leave to Amend [See AA p. 000556, as well as AA p. 000163, et seq., and AA p. 000342, et seq.].

This case is primarily about allegations regarding Kaiser's[1] failure to accommodate Friedman's religious ethical

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[1] Herein "Kaiser" refers to the group of Defendant/Respondents sued herein as SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, a California partnership, KAISER FOUNDATION HOSPITALS, a California

belief of not harming animals that is Friedman's ethical and moral equivalent of his religion. Friedman alleged that he is an Ethical Vegan and was a Computer Technician *working in a non-public, non-health care facility, warehouse* for Kaiser in Downey, as a contract worker, *having absolutely no contact with patients.* Friedman alleges that his actual employment was with MacTemps[2], which entity contracted out his services to Kaiser, and after working for *nearly one-year* for Kaiser as a contract worker through MacTemps, Kaiser liked Friedman's work so well that Kaiser offered Friedman an in-house position doing the same work, at the same location, *continuing to also have absolutely no contact with patients.* However, it is alleged that Kaiser required Friedman to undergo a health/vaccination screening. [See Complaint is at AA, p. 000001, et seq.]

Friedman alleges that when he, a contract worker at Kaiser in April of 1998 refused - for moral, ethical and religious reasons - to take a mumps vaccination that included material from chicken embryos, his employment contract/work offer with Kaiser was canceled and a full-time work offer was rescinded and he was removed from Kaiser under his contract.

Friedman alleges that the reason that Friedman refused the test because it is grown in chicken embryos, violating his Ethical Vegan beliefs, which prohibit the eating, wearing or using of any animal products. According to the Friedman's

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corporation, and KAISER FOUNDATION HEALTH PLAN, INC., a California corporation.

[2] Herein "MacTemps" refers to the group of Defendants sued as MACTEMPS, an unknown business entity, AQUENT, an unknown business entity, doing business as MACTEMPS, and LASER DESIGNS, Corporation Which Will Do Business in California as MACTEMPS. MacTemps, however, was dismissed after a settlement with them, and is not a part of this appeal. See AA p. 000369.

Ethical Vegan belief system, egg-laying hens suffer greatly in chicken factory farms, and the use of unborn chickens to culture the mumps vaccine causes further unnecessary deaths of chickens.

Friedman alleged that at the time of his filing his Complaint, that for the prior nine years, Friedman had been a strict Ethical Vegan, meaning that he believes that all living beings must be valued equally and that it is immoral and unethical for humans to kill and exploit animals, even for food, clothing and the testing of product safety for humans. Among the consequences of this belief are that Friedman cannot eat any animal based substances, such as meat, milk products, eggs, honey, or any other food which contains ingredients derived from or tested on animals, that Friedman cannot use products which have been tested for human safety on animals or which derive any of their ingredients from animals such as cleaners, soap or toothpaste. Friedman asserts these views as spiritual in nature, that he holds them with the strength of traditional religious views, that Friedman's views are so strong that he has even been arrested for civil disobedience actions at animal rights demonstrations, that these beliefs occupy a position in the Friedman's life parallel to that filled by God in traditionally religious individuals adhering to the Jewish, Christian or Muslim Faiths. [See the Complaint herein, AA p. 000001, et seq., and in particular, See AA p. 000002, and confirmed by the court in its order, at AA p. 000163, and AA pp. 000164-000165].

When on March 26, 1998, Kaiser informed Friedman that Kaiser required that Friedman undergo an immunization for mumps, Friedman checked with the Centers for Disease Control and Prevention, and learned that the mumps vaccine is grown in chicken embryos, and according to Friedman, being inoculated with the mumps vaccine therefore was in violation of his Ethical Vegan beliefs. Friedman advised Kaiser that he was however, willing to comply with the spirit of the immunization requirement by some means other than

subjecting himself to inoculation with the vaccine for mumps, including being checked periodically for mumps symptoms, following any other regimen not involving the suffering or death of an animal, and even agreeing to work off-site. Friedman's direct supervisor at Kaiser was willing to accommodate Friedman, however, the upper management/human resources department was not, and on or about April 10, 1998, Friedman was told that was his last day, and termination of his employment agreement. [See the Complaint herein, AA p. 000001, et seq., and confirmed by the court in its order, at AA p. 000163, and AA pp. 000165-000166]. In doing so, Kaiser failed to attempt to reasonably accommodate Friedman's Ethical Vegan beliefs when he refused the mumps vaccination.

Friedman filed his Complaint on February 3, 2000. [AA p. 000001, et seq.]. The Complaint alleged eleven (11) causes of action, including the first three (3) for employment discrimination, the first cause of action for employment discrimination against both the Kaiser and MacTemps based on religion under California Government Code §12940, the second cause of action for failure to maintain a work environment free from discrimination under *California Government Code* §12940(i) against both the Kaiser and MacTemps Defendants, and the third cause of action for retaliation against the Kaiser Defendants only based on the allegation that the Kaiser Defendants' conduct was retaliatory under *Government Code* §12940(f). The Kaiser Defendants filed their original Demurrer to the Complaint on March 24, 2000. [AA p. 000026, et seq.; See also their Memorandum of Points and Authorities, at AA p. 000032, et seq., and their Motion to Strike, at AA p. 000043, et seq.] In addition to Friedman filing an opposition to this Demurrer, an organization known as "In Defense of Animals" attempted to file an Amicus Curiae Brief on April 14, 2000, in support of Friedman's position. [See AA p. 000072, et seq.]. However, the Court denied the application to file the Amicus brief. [See the Minute Order reflecting same,

at AA p. 000114, et seq.]. Friedman expects not only that this Amicus Curiae to submit a letter in support of review, but also additionally expects that one or more traditionally recognized, e.g., Christian and theistic, religious organizations will be filing such letters in support of granting review in this matter. This shows the importance of this matter, and that review should be granted.

At the hearing of the original demurrer, on July 7, 2000, the Court took the matter under submission, and thereafter, sustained all of the demurrers to the *FEHA* religious discrimination causes of action, i.e., causes of action one, two and three, without leave to amend. The remainder of the demurrers, i.e., the non-religious discrimination causes of action, were sustained with leave to amend. Causes of action ten and eleven were not a part of the demurrers that date. A copy of he Minute Order regarding this demurrer and motion to strike is included as AA p. 000161, et seq. Also, the Order Sustaining the Demurrer is included as AA p. 000163, et seq. The Court sets forth the issue herein at AA p. 000164, et seq. Essentially, the Demurrer to the first three causes of action was sustained because the Court believed that Veganism cannot be a religion or the equivalent of a religion under the *FEHA* statute, and refused the Plaintiff requested leave to amend on these causes of action related to religious discrimination and/or retaliation.

Friedman amended his complaint and filed a First Amended Complaint, on July 17, 2000. [AA p. 000001, et seq.] However, the portion of the Complaint dealing with employment discrimination against Kaiser was not allowed to be replead against Kaiser based upon the prior Order denying leave to amend. Therefore, and for that reason alone, the amended complaint was not plead against Kaiser for religious discrimination in the amended complaint. [See AA p. 000172, et seq.]

Kaiser set a new demurrer to the first amended complaint, which Friedman opposed. [See AA p. 000200, et

seq., and AA p. 000207, et seq.] On August 16, 2000, the Court sustained all of the demurrers, with the exception of the tenth cause of action for breach of the implied covenant of good faith, which remained active. [See Minute Order, AA p. 000342] Kaiser filed their answer to the remaining tenth cause of action for breach of implied contract in the first amended complaint, on August 25, 2000. [AA p. 000351, et seq.]

On September 5, 2000, the Plaintiff filed a Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief and Request for Stay of Action Pending Determination of Writ, with the Court of Appeals. On or about September 13, 2000, the Court of Appeals summarily denied the Petition for Writ, presumably because Friedman had the right to file an appeal upon a Judgment being entered at the conclusion of this case, which he then did. [See Court of Appeals, Second Appellate District, Division Five, Docket No. B143989].

After initially proceeding on the remaining Tenth Cause of Action as to Kaiser, the Friedman voluntarily dismissed the remaining Tenth Cause of Action, with the express reservation that the remaining causes of action would be appealed. [AA p. 000372].

After learning of the trial court's recusal of itself in this matter, Friedman filed a Motion to Amend Complaint, etc., which was filed March 8, 2001, which was denied. [AA p. 000399; See also Minute Order, AA p. 000556]. The Court did enter Judgment in favor of Kaiser on May 29, 2001. [AA p. 000556, and see Judgment at AA p. 000557]. On May 7, 2001, the Friedman filed a Notice of Appeal from the Judgment in favor of Kaiser. [See AA p. 000557, et seq., for Judgment and see AA p. 000564, et seq., for Notice of Appeal]. During the appeal Animal Legal Defense Fund attempted to file an Amicus Curiae Brief, but the Court of Appeals denied the request.

On September 13, 2002, the Court of Appeals filed a decision on this case affirming the lower court decision and setting forth a new rule of law with regard to the definition of

"religious creed" under the *FEHA*. The Court of Appeals published the portion of the decision setting forth the new rule of law defining "religious creed" under the *FEHA*. A copy of the Opinion (hereinafter referred to as "Opn.") is attached hereto as Exhibit "A." Further a copy of an Order Modifying Opinion [No Change in Judgment] was filed September 24, 2002, is attached hereto as Exhibit "B."

Friedman filed a Petition for Rehearing, but the Petition was denied on October 7, 2002.

LEGAL DISCUSSION

1. Introduction.

This Court should grant hearing in this matter because such review is "necessary to secure uniformity of decision or the *settlement of important questions of law.*" [See *California Rules of Court* 29(a)(1), emphasis added]. In this regard, the settlement of the definitions of "religion" and "religious beliefs" and "religious creed" under the *FEHA* are important questions of law. Historically, there has always been much confusion regarding what is and what is not a religion under the law, both State and Federal. Further, the Court of Appeal here was the first court to forth a definition in California for a religion under the *California Fair Employment and Housing Act ("FEHA")*, i.e., *Government Code* §12900, et seq.

Apparently, while no case before had determined whether veganism or Ethical Veganism to be the equivalent of a religion, the *EEOC* has actually held and made a determination in another case that they considered it to be the equivalent of a religion. [See AA p. 000313-000314]. In the Determination in *Anderson v. Orange County Transit Authority*, Charge No. 345960598, a copy of which is included at AA pp. 000313-000314, the *EEOC* determined that Anderson, was a "strict vegetarian due to moral and ethical beliefs as to what is right and wrong, and that he sincerely holds these beliefs with the strength of traditional religious views," was protected by the anti-religious discrimination statutes. Likewise, Friedman

should be so protected by the anti-religious discrimination statutes here, too.

Further, there is a Canadian case that held that a prisoner who held a belief that "consumption of animal products is morally wrong" can be protected under a "freedom of conscience," equivalent to a freedom of religion. That case stated that "Motivation for practi[c]ing vegetarianism may vary, but, in my opinion, its underlying belief system may fall under an expression of 'conscience.'" [*Jack Maurice v. Attorney General of Canada*, 2002 FCT 69 (Docket T-1487-99) (Decided January 21, 2002), <http://decisions.fct-cf.gc.ca/fct/2002/2002fct69.html>].

The fact that these two holdings conflict with the Court of Appeals decision further shows that this case to be ripe for review by this Court. The settlement of the definitions of "religion" and "religious beliefs" and "religious creed" under the *FEHA* are important questions of law. Further, the application of leave to amend to new rules of law is likewise important to be applied evenly statewide. Therefore, this Court should grant hearing in this matter because such review is "necessary to secure uniformity of decision or the *settlement of important questions of law.*" [See *California Rules of Court* 29(a)(1), emphasis added].

2. While Law as to What Qualifies as a Religion or Religious Belief or Creed Is a Matter of Great Import, Such Law Appears Muddled At Best; Furthermore, Its Application to California Employment Law Appears to be a Case of First Impression; Whether or Not Ethical Veganism Qualifies as a Religious Belief or The Legal Equivalent of a Religious Belief Under *FEHA* is a Perfect Vehicle to Set Forth the Definition of a Religion in This Context.

The present case appears to be a case of first impression not only as to whether Ethical Veganism qualifies as a religious belief or the legal equivalent of a religious belief

under *FEHA* in an area of law, discrimination, with a public policy of remedying discrimination, but also a case of first impression as to what the definition of a religion or religious belief or creed under the *FEHA*. Veganism and Ethical Veganism, as "non-traditional" beliefs, provides a perfect vehicle for this Court to set forth the correct definitions of religion and religious beliefs and creeds. While no one would question whether Judaism, Christianity or Islam are religions, there are a multitude of other "non-traditional" religions in this Country that could provide such an inquiry. Veganism and Ethical Veganism provides the ideal framework for this Court to set forth a definition of religion that complies with both the spirit of the *FEHA*, as well as also follows other precedents and further does not violate the Constitution. As America, and more so, as California, becomes more and more diverse and cosmopolitan, both in religions as well as cultures, the issue of what is a religion becomes of great importance. Furthermore, the area of law, employment discrimination law, is an important area, in particular, because employment is necessary in order to earn a living and purchase the necessaries of life, such as food, clothing and shelter. Not only is the right to religious freedom protected by the *First Amendment* to the *United States Constitution*, but also the right to "life, liberty, or property," referred to in *Fourteenth Amendment* to the *United States Constitution*, sometimes has been deemed to include the right to contract, including contracts of personal employment.

While the issue of "what is a religion" is most known from the conscientious objector cases, there appears to be no known appellate case determining whether Ethical Veganism is a religion. In the conscientious objectors cases, the issue was whether forced military service violates a true religious belief, or whether the objector is simply alleging the belief as a ruse to avoid serving in the armed forces. See, for example, *United States v. Seeger* (1965) 380 U.S. 163, 13 L.Ed.2d 733, 85 S.Ct. 850. Apparently, the courts are not to test the "truth" or "validity"

of an alleged religious practice, but to look instead to see if the person is feigning belief to avoid an otherwise legitimate obligation. Other than the Administrative Regulations [see AA p. 000309, AA pp. 000310-000311 and AA p. 000312], the only other known precedent directly on point, albeit non-binding, is an EEOC Determination Letter holding Veganism to be the functional equivalent of a religious belief. [See AA pp. 000313-000314 for copy of EEOC Determination Letter]. The issue of whether Veganism or Ethical Veganism to be a religion appears never addressed other than in that EEOC Determination Letter on that one case. This issue is therefore important and also ripe for consideration.

This case presents an issue of first impression that is a matter of extreme public policy, as reflected by not only statute, i.e., the *FEHA*, but also by Constitutional protections. Both the *California Constitution* and the *United States Constitution, First Amendment*, provide extensive protections to individuals based upon their religious beliefs. Protection of an individuals religious beliefs and reverse side of the coin, protection from discrimination on the basis of those beliefs, is of utmost fundamental importance in our Constitutional structure of government in this country. Therefore, this matter and the reach of religious belief protection is of extreme fundamental public policy. This public policy is reflected in the fact that while in ordinary breach of contract or wrongful termination cases, only economic damages are allowed, and such noneconomic damages as pain and suffering and punitive damages are not allowed, those noneconomic damages are allowed in discrimination cases, including religious discrimination cases.

The issue here is whether the provisions and protections of the *California Fair Employment and Housing Act ("FEHA")* apply to Ethical Vegans; Friedman contends that they do, and for good reason, to protect not only his own beliefs, but those of all denominations and non-denominations of beliefs that are considered religious or the equivalent to the

believer. A determination herein that Ethical Veganism is protected by the *FEHA* will protect everyone's right to be free from religious discrimination in the work place, not just Vegans.

The Court of Appeal has used Federal case precedent that should not apply to a State Court anti-employment discrimination case, as is a *FEHA* case. One of the cases, *United States v. Meyers*, 906 F.Supp. 1484, 1504 (D. Wy. 1995), aff'd, 95 F.3d 1475 (10th Cir. 1996), cert. denied, 522 U.S. 1006 (1997), held that the beliefs held by the founder of the Church of Marijuana more accurately espouse a philosophy or way of life rather than a religion. Not only is that case an "out of district" (California is in the 9th Circuit) case, it is based upon illegal conduct (marijuana usage), whereas Friedman's beliefs are clearly *not* illegal. It is disingenuous to compare beliefs in illegal activities (which anti-discrimination statutes do not protect) compared to Friedman's sincere Ethical Vegan belief in non-violence to animals of all kinds (which clearly is not illegal).

Friedman's Ethical Veganism beliefs are sincere. They are not illegal. Friedman's beliefs occupies the place of importance parallel to religion. It should be noted that "vegetism" is not the same as Ethical Veganism, let alone Veganism. Again, "vegetism" is not Veganism. The reason for this is "vegetism" does not include the moral and ethical components that Veganism includes. Further, Friedman's views do fit the *Meyers* factors. Veganism and Ethical Veganism are not confined to one question alone, it is much broader. Vegans do not just eat vegetables (as under "vegetism"), but additionally such Vegan beliefs encompass all aspects of one's beliefs, from not only not eating meat, but not eating dairy products, not using soap derived from animal products, not wearing leather, wool, silk or other animal products, and, more to the point of this case, not getting vaccinated with vaccines made, derived or tested on animals. [See AA pp. 000002-000003].

All forms and aspects of religion, however eccentric, are generally included. *Cooper v. General Dynamics, Convair Aerospace Div.* (5th Cir. 1976) 533 Fed.2d 163, 168-169, *cert denied,* 43 U.S. 908 (1977). A religion does not require a formal organization or a "written form" to be protected by equal employment opportunity laws. [See *Brown v. Dade Christian Schools, Inc.* (5th Cir. 1997) 556 Fed.2d 310, 311-312, cert. denied, 434 U.S. 1063].

Further, it is not the case that only "institutional religions" are protected by the *FEHA* (and *Title VII,* as well). Neither the case law, nor the Code and Regulations promulgated thereby, support such a position that only "institutional religions" are protected. It should be kept in mind that the various branches of the Protestant Christian churches, such as Methodist, Baptist, Lutheran, Episcopalian, Presbyterian, etc., at one time were *not* considered "institutional religions," with the Roman Catholic Church being the only "institutional" Christian religion, hence the term "Protestant," as in "protest."

A California tax case that set forth a very broad definition of religion and religious beliefs, *Fellowship of Humanity v. County of Alameda* (1957) 153 Cal.App.2d 673, 315 P.2d 394, has even been cited as authority in two U.S. Supreme Court cases. (See *School Dist. v. Schempp* (1963) 374 U.S. 203, 302, 10 L.Ed.2d 844, 903, 83 S.Ct. 1560, 1613, and *Torcaso v. Watkins* (1961) 367 U.S. 488, 495, 6 L.Ed.2d 982, 987, 81 S.Ct. 1680, 1684). This case included "Taoism, classic Buddhism, and Confucianism" as religions. Id., at pp. 684, 690. And also includes "humanists" and others that do not believe in "God or gods." Id., at pp. 680, 687 and 690. This case defined religion primarily in a constitutional setting, and should include Friedman herein's Ethical Vegan beliefs. However, the definition of religion in a anti-discrimination setting, such as *FEHA* here, should be broader than that in the constitutional (usually, Establishment Clause) setting in order to serve the

differing public policy purpose of eliminating discrimination in the workplace.

On the other hand, note that the holding in the decision here, unless set aside by this Court, may not protect these "Eastern" religions because they may not fit the three prong test set forth in the Court of Appeal's Opinion.

In fact, the use of the term "creed" in addition to "belief or observance" or merely "religion" in the anti-discrimination *FEHA* statute could connote an intended broader interpretation for religion. See as an example the difference between *Government Code* §12940(a) using term "religious creed" as opposed to *Government Code* §12940(j) using term "religious belief or observance." Note also the broad definition in *Government Code* §12940(o), using terms "religious creed," "religion," "religious observance," "religious belief," and "creed" to include "all aspects" of same.

Similarly, guidelines issued by the Internal Revenue Service to determine if an organization is organized and operated exclusively for religious purposes focus on a nonsecular definition of religion. The guidelines posit two basic questions: 1) Are the organization's beliefs truly and sincerely held by those professing them, as opposed to a mere sham, and 2) Are the practices and rites associated with the organization's belief or creed illegal or contrary to clearly defined public policy. If beliefs are truly and sincerely held, and practices do not violate law or clearly defined public policy, the Service will not question the religious nature of the organization's beliefs. [*I.R.S. Code* §[7.8.1]3.3.2 (1999)].

Ethical Veganism extends beyond trivial dietary preferences. Diet is merely a small part of observing a non-exploitive relationship with the people and animals of this world. Ethical Veganism is a relational lens through which to view the world. Ethical Vegans are not "speciesist" and value the sanctity of all life, seeking to exclude from their life, as far as possible and practical, all forms of exploitation of, and cruelty to, animals for food, clothing or any other purpose.

Consequently, Ethical Vegans do not eat meat, fish or poultry, and do not use other animal products and by-products including eggs, dairy products, honey, leather, fur, wool, soaps and toothpastes which contain lard, etc., and Ethical Vegans do not participate in the biomedical experimentation on animals and avoid activities or products which encourage it. As can be seen by this "list" of prohibited activities, being vegetarian is only one small part of being an Ethical Vegan. While being a Vegan or Ethical Vegan necessarily implies that one is a vegetarian, the opposite is not true; being a vegetarian does not imply one is an Ethical Vegan, let alone a Vegan. A recent poll estimates there are a half million Vegans in the continental United States.[3] There is a common ethical principle shared by all Vegans which is a reverence for life and desire to live with, as opposed to depend upon, the others species of the planet. Veganism is therefore not some bizarre trivial personal belief, but is a sincerely held set of moral and ethical values that rise to the level religious beliefs, and should be afforded religious protections as such. In addition to these vegans and Ethical Vegans, there are millions of adherents to other non-traditional religions. Therefore, it is a matter of great importance and statewide concern that this Court set the proper definitions of religion and religious beliefs and creeds subject to the *FEHA's* employment protections.

3. The Fact the Court of Appeals Disregarded the Administrative Regulations Defining "Religious Creed" is a Matter of Importance Justifying Granting Review.

California Government Code §12926(o), defines the religion terms as meaning that "'Religious creed,' 'religion,' 'religious observance,' 'religious belief, and 'creed' include all

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[3] A 1994 poll conducted by the Vegetarian Resource Group of 1,978 men and women reflects an estimated 500,000 Vegans in the United States. Debra Wasserman & Reed Mangels, *Vegan Handbook* at 229-230 (1996).

aspects of religious belief, observance, and practice." *California Government Code* §12935, regarding the "Functions, powers and duties of commission," provides that "The commission shall have the following functions, powers, and duties: (a) To adopt, promulgate, amend, and rescind suitable rules, regulations, and standards (1) to interpret, implement, and apply all provisions of this part, (2) to regulate the conduct of hearings held pursuant to Sections 12967 and 12980, and (3) to carry out all other functions and duties of the commission pursuant to this part."

Pursuant to this authority, the Commission has defined "religious creed." 2 *Cal. Code Reg.* §7293.1, included at AA p. 000309, regarding "Establishing Religious Creed Discrimination," states, emphasis added, that "'Religious creed' includes any traditionally recognized religion as well as beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life *a place of importance parallel to that of traditionally recognized religions. . . .*" 2 *Cal. Code Reg.* §7293.3 likewise requires employers to "make reasonable accommodation to the known religious creed of an applicant or employee." A copy of this regulation is included at AA pp. 000310-000311. Even the under federal regulations, "religious practices" include moral or ethical beliefs about what is right and wrong that are sincerely held with the strength of traditional religious views [See 29 C.F.R. §1605.1, a copy included at AA p. 000312]. This regulation has even been used to show that even if no religious group espouses such beliefs, the belief can still be a religious belief of the employee or prospective employee, which would appear equally applicable under *FEHA*.

Clearly, under the regulatory definition, Friedman beliefs about Ethical Veganism qualify as "religious creed." Friedman has plead that he "holds these beliefs with the strength of traditional religious views. . ." [Complaint, page 2, line 24, at AA p. 000002], and that "These are sincere and meaningful beliefs which occupy a place in Friedman's life

parallel to that filled by God in traditionally religious individuals adhering to the Christian, Jewish or Muslim Faiths" [Complaint, page 2, line 28, to page 3, line 2; see AA pp. 000002-000003].

This is very important, when considered in conjunction with the legal proposition that an administrative agency's interpretation of its own regulation "deserves great weight." [*Culligan Water Conditioning v. State Bd. Of Equalization* (1976) 17 Cal.3d 86, 93]. "[T]he primary rule is to respect the subject matter expertise of the agency charged with enforcing the regulation and to defer to that agency's interpretation unless it is clearly erroneous or unauthorized." [*Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, 973-974]. Therefore, the Commission's administrative regulations holding that "'Religious creed' includes any traditionally recognized religion as well as beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life *a place of importance parallel to that of traditionally recognized religions*. . . .," "deserves great weight," and the Plaintiff's beliefs deserve such protections under the law and under these regulations. [See 2 *Cal. Code Reg.* §7293.3; see also *Culligan Water Conditioning v. State Bd. Of Equalization* (1976) 17 Cal.3d 86, 93]. It is therefore of statewide concern that the Court of Appeals failed to follow the agency's interpretation.

4. The Requirements of "Religious Creed" Discrimination Under The Court's New Definition Are Problematic.

While the Court acknowledges that this was a case of first impression as to what the definition of "religious creed" was under the *FEHA*, [Opn., p. 6, §2, 1st ¶], the Plaintiff has already plead, or it can be considered reasonably plead when the complaint is viewed in a reasonable light most favorable to the Plaintiff, the requirements under such a definition. Notwithstanding this, the Court of Appeals new definition of

"religious creed" is problematic and confusing and does not make for a good test or standard.

The several tests mentioned in the opinion culminate in this court's conclusion, which is Judge Adams' three-prong test, beginning on page 34. [Opn., 34-36] "First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters." While this may not be simple veganism, it is Ethical Veganism. Ethical Veganism asks what is the ultimate meaning of life and concludes veganism in the broadest sense, compassion for all life, amelioration of suffering, advocacy of happiness and cooperation. The query and conclusion makes it ethical. These are similar core tenets to Quakers and Buddhists and countless other denominations of a myriad of religions. While the foundation is not on a supreme being as the Quakers rely upon, it rests on a philosophy revealed by Peter Singer much like Buddhism was a philosophy revealed by Siddhartha. "Imponderable matters" is a strange qualifier as members of all sorts of traditional religions would claim their religion is ponderable--able to be precisely evaluated. Not that they would necessarily claim they would succeed. There are, for example, Christians who rely heavily on faith and those who rely heavily on formal logic, and that is why there are Christian scholars. The former claim religion is imponderable, the latter do not. If the court is asking for epistemology, the elemental meaning of Ethical Veganism, it may very well be imponderable depending on who is asked. Therefore, this criteria or prong is problematic and fails as a proper test. Further, it should be noted that the court incorrectly states that "There is no apparent spiritual or otherworldly component to plaintiff's beliefs." [Opn., p. 35]. Yet, the court earlier in its opinion cites to just such allegations contained in the Plaintiff's complaint, that "He lives each aspect of his life in accordance with this system of ***spiritual beliefs***[, and] [t]his belief system[] guides the way that he lives his life[, and] [Plaintiff's] beliefs are ***spiritual*** in nature and set a course for his entire way of

life[, and] he would disregard elementary self-interest in preference to transgressing these tenets." [Opn., p. 3, emphasis added; See also AA p. 000002-000003, ¶4]. Further, in the complaint as quoted in the opinion [Opn., pp. 3-4 See also AA, p. 000002-000003, ¶4], "violating natural law, foundational creeds, beliefs spiritual in nature, disregarding elementary self-interest, guiding the way I live my life" are all fundamental. "Natural law, foundational creeds, and beliefs spiritual in nature" are addressing ultimate questions. "Natural law, spiritual beliefs" are matters addressing deep and imponderable matters. Plaintiff has therefore satisfied the first prong of this court's new definition of religious creed. The complexity and inconsistency of the Court of Appeal's new test for "religious creed" is shown by the fact that, as shown here, while Friedman has satisfied the test, the Court of Appeal came to the opposite conclusion.

"Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching." The distinction between "comprehensive nature" and "an isolated teaching" is a question of fact. Taoism, for example, has the isolated teaching of balance which is applied comprehensively to the universe. Otherwise, is the court claiming that simple religions are unreasonable because they are not complicated? This would topple any new religion because traditional religions have hundreds or thousands of years to become comprehensive. This is an unconstitutional test of reasonableness. Ethical Veganism is comprehensive to the Plaintiff, extending to every aspect of his life, even his dreams. A nonvegan may not think it is comprehensive, but that could also apply to others' views of anyone else's religion. Since the Plaintiff's Ethical Vegan belief system encompasses all aspects and elements of not only his life, but the lives of all animals, the belief system is comprehensive and satisfies the second prong of this court's requirements for a religious creed. Therefore, the second prong is likewise problematic and fails

as a proper test. Would Taoism be considered a religion under this test?–Probably not.

The court's definition of religion is heavily biased in favor of Western religions. It is questionable whether Taoism, classic Buddhism or Confucianism could satisfy the court's requirements of "religious creed," as set forth in the opinion of this court. And, if as it should be, Confucianism is considered a religious creed, so too should Ethical Veganism. Ethical Veganism has been around at least since 4 B.C.E. as practiced by Apollonius of Tyana -- who wore bark for sandals, refused meat and all animal products, even refusing a wax sculpture tribute to him because it came from bees. Modernly, Peter Singer (a Princeton professor of ethics) consolidated several philosophies about what it means to be human in the sense of moral obligations. These writings have become the religious tenets of millions of adherents. Under Apollonius or Singer, Ethical Veganism is perfectly analogous to Confucianism, and should be considered a religion.

"Third, a religion often can be recognized by the presence of certain formal and external signs." This again is biased against new religions and may also be an unconstitutional test of reasonableness. Even so, some Ethical Vegans recognize Gandhi's birthday (October 2nd) as a holiday, and World Vegan Day is November 1st. Further, Peter Singer may be considered a founder of the compiled philosophy and may have many teachers, the equivalent of "ministers." In fact, if the Plaintiff were allowed to amend his complaint, he could plead that in California, a legal marriage license has been issued for a marriage to be performed by an Ethical Vegan, and that in Massachusetts, the state approved the issuing of same. There are vegan songs, heroes, and many Ethical Vegans aim to convert others to Ethical Veganism. In this sense, Ethical Veganism is evangelical or proselytizing as are many Christian religions. Friedman can allege that he has a tattoo on his left arm symbolizing Ethical Veganism, as some Christians would tattoo a crucifix. In terms of what the

Friedman already pled in his complaint-Friedman pled his diet (setting forth what he cannot eat under Ethical Veganism) and clothing (setting forth what he cannot wear under Ethical Veganism) are traditional "formal and external signs" of religion. Similarly, the civil disobedience comparison to Operation Rescue is an external sign of religious faith and devotion to these values, or the great sacrifice Jehovah's Witnesses are known to take to retain their religious purity. [AA, pp. 000002-000003, ¶4]. But as the Court of Appeals points out, the third prong is not really a deciding factor is its absence does not prevent a belief being held to be a religious one. But when should the third prong be used under the Court of Appeals new standard?-The Court of Appeals is not clear on this.

All of these issues and problems show that the Court of Appeals new test is problematic and inappropriate. In light of the importance of religion and employment for individuals, this Court should grant review and fashion a more appropriate test or standard for "religious creed."

Furthermore, it is a matter of "institutional" public policy significance that will affect the important rights of other parties in other cases as to the proper definition of religion and religious beliefs and creeds under the *FEHA*. This case involves the area of overlap between what may be the two most important aspects of an individual's life-religion and work. Therefore, this Court should grant review.

5. The Court's Rule of Law Violates the Establishment Clause, Especially in Light of the Fact That the Determination of Whether the Plaintiff's Ethical Vegan Beliefs Were a "Religious Creed" Were Determined by Demurrer, Rather than by a Fact-finder after Expert Testimony Religious Scholars.

The Court of Appeal's new rule of law violates the Establishment Clause of the Constitution, especially in light of the fact that the determination of whether the plaintiff's

Ethical Vegan beliefs were a "religious creed" were determined by demurrer, rather than by a fact-finder after expert testimony religious scholars. The case should have gone to a jury (or at a minimum, a judge on summary judgment), to determine factually whether the Plaintiff's Ethical Vegan beliefs qualify as a "religious creed" for *FEHA* purposes.

Starting on page 31 [Opn., p. 31], this court says the trend is to define religion more narrowly by comparing proclaimed religions to traditional religions. This is a violation of the Free Exercise and Establishment Clause by setting up approved religions, which other asserted religions are to be compared. Furthermore, it violates the Due Process Clause. "Free Exercise" is not intended to only apply to "traditional religions," which, as mentioned above, at one point did not even include the Protestant Church, hence the name "Protest"-ant. The court therefore favors traditional religions and disfavors non-traditional religions, a violation of the Establishment Clause which is to give no preference. Indeed, the government can only test sincerity, not reasonableness; otherwise, the court is saying that traditional religions are reasonable and untraditional religions are reasonable only if they are like traditional religions. On page 32 [Opn., p. 32], the Court of Appeals refers to "a place of importance parallel to that of traditionally recognized religions." This again may violate the Establishment Clause which prohibits the setting up what is a reasonable religion and those that are not reasonable, and those considered not reasonable by the court, are not considered religions.

Neither the trial court nor the court of Appeals court should have tested the reasonableness of Plaintiff's religion through the above test. At a minimum, the issue of whether or not the Plaintiff's Ethical Vegan beliefs are a "religious creed" should have been decided by a trier of fact, not as a matter of law on a demurrer. The determination of religious beliefs and violations of the Establishment Clause of the Constitution are

issues of important statewide concern, and this Court should therefore grant review.

6. The Court Should Have Construed California "Religious Creed" Discrimination Protections Broader than Federal Protections, Not Narrower.

Although the court notes that "California courts have consistently looked to federal authority," [Opn., p. 10], the court opines that *California Code of Regulations*, Title 2, Section 7293.1 cannot be construed as broadly. [Opn., 21-22]. This overlooks the fact that California anti-discrimination protections are generally interpreted more broadly than the federal interpretations, and when the court's do not follow this principal, the Legislature overrules the courts. [See as example *Government Code* §12941.1, rejecting the decision of *Marks v. Loral Corp.* (1997) 57 Cal.App.4th 30; See also, *Government Code* §12940(j), in particular §12940(j)(3), amended to reject the no co-worker liability rule in *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132 (1999)]. The legislative intent is thus that *Government Code* §12940 should be interpreted broadly to provide the greatest possible protection for employees and applicants.

Thus, the court should have construed California "religious creed" discrimination protections broader than federal protections, not narrower, which is an important issue of statewide concern.

7. Even If the Appellant Did Not Plead the Elements of the New Definition of "Religious Creed," as this Was a Case of First Impression, the Appellant Should Have Been Afforded Leave to Amend upon Remand to Allow Him to Plead His Case under the New Definition That the Court Has Set Forth in the Decision; Allowing Leave in Such

Circumstances Should Be a Rule of General Statewide Application.

At the trial court level, the trial court provided no leave to amend the complaint after dismissing the religious creed discrimination causes of action. [AA, pp. 000161-000162 and AA, pp. 000163-000170]. As the Court of Appeals noted, this area of the law has previously been unclear and this is a case of first impression as to defining religious creed under the *FEHA*. [Opn., p. 6, §2, first ¶]. Prior to dismissing the religious creed discrimination claims in the complaint, the trial court should have provided guidance in terms of what the court considered to be required in what this court even admits to be a murky area of defining what is a religion. The Ninth Circuit Court of Appeals held in *Bautista v. Los Angeles County*, 216 Fed.3d 837 (9th Cir. 2000), that a District Court must provide guidance to the Plaintiff and her counsel prior to dismissing with prejudice. Such logic would seem especially necessary in situations such as this where the rule of law has yet to be formulated by the courts. Further, the courts of this state have held that "Trial courts are vested with the discretion to allow amendments to pleadings in furtherance of justice . . . That trial courts are to liberally permit such amendments, at any stage of the proceeding, has been established policy in this state . . . resting on the fundamental policy that cases should be decided on their merits." *[Hirsa v. Superior Court (Vickers)*, (1981) 118 Cal.App.3d 486, 173 Cal.Rptr. 418.] Likewise, when a new rule of law sets forth the legal requirement of pleading at the appellate level, justice should require that the case be remanded back to the trial court in order to determine whether the Plaintiff can plead the elements of that new rule of law.

Further, what is troubling is the way that the Court of Appeal has given short shrift to the Plaintiff's request to amend his complaint from "vegan" to "Ethical Vegan." In that the court's second requirement for religious creed includes a "belief-system," [Opn., p. 35], such an amendment to allege an "Ethical Vegan" belief-system seems to be an important

amendment indeed. The one-paragraph discussion of "Leave to Amend" in the opinion seems lacking and misses the point of the amendment. [Opn., 36-37]. The amendment to change "vegan" to "Ethical Vegan" is intended to show that this Plaintiff's views (as well as others who belief in Ethical Veganism, as opposed to mere veganism), encompass a comprehensive belief-system.

Should the Court of Appeal's new rule of law as to determining what a religion for the purposes of the *FEHA* stand, equity and the maxim that all cases should generally be tried on their merits requires that this case be remanded to the trial court with instructions to allow the Plaintiff leave to attempt to amend his religious creed discrimination claims, should the court still believe that the Plaintiff has not adequately pled his claims under this new rule of law expressed in California for the first time.

"Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." [*Angie M. v. Sup.Ct. (Hiemstra)* (1995) 37 Cal.App.4th 1217, 1227, 44 Cal.Rptr.2d 197, 204]. In fact, it has been held to be an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action. [*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349, 134 Cal.Rptr. 375, 384; *Okun v. Sup.Ct. (Maple Properties)* (1981) 29 Cal.3d 442, 460, 175 Cal.Rptr. 157, 168]. Inasmuch as the complaint at issue as to the religious discrimination in employment causes of action (causes of action one, two and three) were contained in the *original* Complaint when leave to amend was refused by the Court upon the Court's sustaining the original Demurrer by the Kaiser Defendants without leave, leave should have instead been granted. This is especially so now if the Court of Appeal's new rule of law stands.

"The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding . . . The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as

may be just, an amendment to any pleading or proceeding in other particulars . . . " [C.C.P. § 473]. It is judicial policy to resolve all disputes between the parties on their merits, and to allow amendment of the pleadings to put all such disputes at issue at the time of trial. The principal purpose of vesting the Court with the discretionary power to correct "a mistake in any other respect" is to enable it to mold and direct its proceedings so as to dispose of cases upon their substantial merits, when it can be done without injustice to either party, whether the obstruction to such a disposition of cases be a mistake of fact or mistake as to the law, although it may be that the Court should require a stronger showing to justify relief from the effect of a mistake of law than a mistake of fact. *Ward v. Clay* (1890) 82 Cal. 502, 23 P. 50.

Further, the original demurrer was to a Complaint that plead "Vegan beliefs" rather than "Ethical Vegan beliefs." This factual change might be significant. Ethical Veganism is a sincerely held set of moral and ethical values that rise to the level religious beliefs, and should be afforded religious protections as such.

It is a matter of "institutional" public policy significance that will affect the rights of other parties in other cases as to whether there should be a general policy of allowing leave to amend when a Court sets forth a new rule of law. Therefore, this Court should grant review.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court grant hearing in order to consider the proper definition of religion and religious beliefs and creeds under the *FEHA*, which is an important issue of statewide concern. In doing so, this Court will likely either hold that Veganism or Ethical Veganism is the equivalent of a religious creed or would remand this case to the Superior Court with leave to amend to allow the Plaintiff to plead his case of religious creed discrimination under this court's new standard,

which granting of leave is also a matter of importance for statewide application.

Dated: October 23, 2002

Respectfully submitted,
/s/ Scott D. Myer

BY: SCOTT D. MYER, ESQ.
MYER LAW FIRM,
Attorney for Plaintiff, Appellant and Petitioner, JEROLD DANIEL FRIEDMAN, also known as JERRY FRIEDMAN

[Exhibit "A" - Court of Appeals Decision Removed]

[Exhibit "B" - Order Modifying Opinion Removed]

ATTORNEY'S CERTIFICATE OF SERVICE BY MAIL
[Code Civ. Proc. § 1013a(2)]

I, SCOTT D. MYER, certify:

I am, and at all times mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is Myer Law Firm, 11040 Santa Monica Boulevard, Suite 320, Los Angeles, CA 90025-7515.

I served and will file the attached **PETITION FOR REVIEW**, on October 23, 2002, by depositing a copy of the document in the United States mail at City of Los Angeles, County of Los Angeles, State of California, in a sealed envelope, with first class or Priority Mail postage fully prepaid, addressed to:

CALIFORNIA SUPREME COURT
Attn.: Court Clerk
300 South Spring

[ORIGINAL and -13- COPIES]
(Plus extra copy for conforming)
[By EXPRESS MAIL-CRC 40(k) &

Street, 2nd Floor
Los Angeles, CA 90013-1233 *40(i)]*

Mr. F. Scott Page (Attorney of record for Respondents,
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HEALTH PLAN, INC.)

COURT OF APPEALS (Appellate Court)
Second Appellate District [By CERTIFIED MAIL]
Attn.: Court Clerk
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013-1213

LOS ANGELES SUPERIOR (Court Appealed From)
COURT
Hon. Cesar C. Sarmiento, Judge
Attn.: Court Clerk
111 North Hill Street
Los Angeles, CA 90012

LOS ANGELES SUPERIOR (Court Appealed From)
COURT
Hon. Ronald M. Sohigian, Judge
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who are the attorneys of record for the Defendants, the Court appealed from and the Supreme Court. At that time there was regular delivery of United States mail between the place of deposit and place of address.

Dated: October 23, 2002

/s/ Scott D. Myer
SCOTT D. MYER, ESQ.

EEOC DETERMINATION LETTER ON BRUCE ANDERSON v. ORANGE COUNTY TRANSIT AUTHORITY, CHARGE NO. 345960598

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
San Diego Area Office

Charge Number: 345960598

Bruce Anderson
638 ½ Center Street Costa Mesa, CA 92627
Charging Party

Orange County Transit Authority
550 S. Main Street Orange, CA 92613
Respondent

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the subject filed under Title VII of the Civil Rights Act of 1964, as amended.

All requirement for coverage have been met. Charging Party alleges that Respondent discriminated against him on the basis of religion in violation of Title VII of the Civil Rights Act of 1964, as amended. Specificially, Charging Party asserts that he is a strict vegetarian due to moral and ethical beliefs as to what is right and wrong, and that he sincerely holds these beliefs with the strength of traditional religious views. Charging Party asserts that he was removed suspended and ultimately discharged from his position of bus driver after informing Respondent of the conflict between his strongly held moral and ethical beliefs and the work assignment to "...personally

hand out coupons for free Carl's Jr. hamburgers...." Additionally, Charging Party maintains that Respondent failed to reasonably accommodate him and terminated his employment claiming that he was insubordinate.

Respondent denies that it discriminated against the Charging Party in violation of Title VII of the Civil Rights Act of 1964, as amended, and contends that Charging Party was terminated based solely on his refusal to perform a management directive.

Examination of the evidence of record evinces that on June 4, 1996, Charging Party informed Respondent of the conflict between his strongly held moral and ethical beliefs and the requirement that he distribute hamburger coupons to passengers entering the bus he operated. Respondent failed to reasonably accommodate Charging Party and suspended him without pay on June 4, 1996. On June 7, 1996, after an internal hearing, Charging Party was discharged for failing to comply with Respondent's directive.

Title VII of the Civil Rights Act of 1964, as amended, requires that an employer reasonably accommodate an employees religious observance or practice unless there is an undue hardship. The Commission defines religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed by the United States Supreme Court in United States v. Seeger, 380 U.S. 163 (1965) and Welsh v. United States, 390 U.S. 333 (1970).

In that instant case, Respondent failed to make any effort to reasonably accommodate Charging Party and raises no undue hardship defense. Consequently, I find Respondent discriminated against Charging Party because of his strongly held moral and ethical beliefs by failing to accommodate him. Moreover, Respondent violated Section 703 (a) of Title VII of

the Civil Rights Act of 1964, as amended, by suspending and discharging Charging Party.

Additionally, Section 704(a)of Title VII of the Civil Rights Act of 1964, as amended, makes it an unlawful employment practice to discriminate against any employee because he has opposed any practice made unlawful by the statute. I find sufficient evidence to believe that Charging Party was discharged because he opposed Respondent's unlawful refusal to accommodate him.

Section 706(b) of Title VII requires that if the Commission determines that there is reason to believe that violations have occurred, it shall endeavor to eliminate the alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion. Having determined that there is reason to believe that a violation has occurred, the Commission now invites the parties to Join with it in a collective effort toward a just resolution of this matter. A representative of this office will be in contact with each party in the near future to be in the conciliation process. Disclosure to information obtained by the Commission during the conciliation process will be made in accordance with Section 706(b) of Title VII and Section 1601.26 of the Commission's Procedural Regulations. When the Respondent declines to enter into settlement discussions, or when the Commission's representative for any other reason, is unable to secure a settlement acceptable to the office Director, the Director shall so inform the parties in writing and advise them of the court enforcement alternative available to the Charging Party, aggrieved persons, and the Commission.

8/20/96 Date
on Behalf of the Commission:
/s/ Patrick Matarazza, Director San Diego Area Office

CANADA CASE OF
JACK MAURICE v. ATTORNEY GENERAL OF CANADA

Date: 20020121

Docket: T-1487-99
Neutral citation: 2002 FCT 69

BETWEEN:
JACK MAURICE
Applicant
- and -
ATTORNEY GENERAL OF CANADA
Respondent

REASONS FOR ORDER AND ORDER

CAMPBELL J.:

[1] While in the custody of the Correctional Service of Canada ("CSC") since 1998, the Applicant has repeatedly requested to be served a vegetarian diet. These requests have been denied on the basis that special diets are only authorized for religious beliefs or medical grounds. By this application, the Applicant challenges this denial.

[2] When the application in the present case was filed, the Applicant was an inmate in the Special Handling Unit at the Ste-Anne des Plaines correctional facility in Quebec; he is presently serving the remainder of his sentence in Alberta. In response to one of the Applicant's earlier requests, Warden Cloutier of the Quebec facility stated as follows:

You assert being actually vegetarian; we cannot consider the vegetarianism as being associated with a culture or with a religion. As far as the medical aspect is concerned, you do not meet the criteria to justify a therapeutic diet which is only available upon authorization by the institutional physician and such diets are prescribed on the basis of a diagnosis done by examination or established after diagnostic tests.

You have decided to avoid the food which is provided by our institution and we consider that this decision responds to your personal choice. Consequently, no other food or special nutritional menu will be authorized.(Applicant's Record, p.53) Essentially, the Warden's opinion forms the content of the grievance denial under review in this application.

[1] The Applicant had previously been provided a vegetarian diet because of his membership in the Hare Krishna faith. However, in August 1998, the Applicant renounced his religious faith and continued to demand a special vegetarian diet based on his "freedom of conscience". The Applicant does not eat meat, fish, eggs, poultry, onions, mushrooms and garlic because of his conscientiously held belief that eating those food items is "morally reprehensible and poisonous to society as a whole" (Applicant's Record, p.42).

[3] The Applicant filed four grievances with the Commissioner of the CSC respecting his demand for a vegetarian diet. The grievances were denied on the basis that the Applicant does not meet the religious or medical exemption outlined in the Commissioner's Directive 880, "Food Services" ("CD880"). The reasons for the final grievance, Grievance V3000A000883, dated July 14, 1999, incorporated the previous grounds for refusal contained in Grievance No. V3000A000357 and denied the grievance on the basis that the issue had been addressed previously.

[4] The Applicant in the present application challenges the decision in the final grievance on numerous grounds including violation of his rights under the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). In my opinion, it is unnecessary to deal with the full breadth of these submissions because the fundamental issue in this judicial review is whether the Applicant is entitled, as a matter of right, to a special diet; the Applicant has stated the question as "whether the rule of law obligates the CSC to provide a vegetarian diet in accommodation of an individual inmate's non-religious beliefs" (Applicant's Application Record, p.251).

[5] Religious diets are provided to inmates as mandated by the Corrections and Conditional Release legislative scheme. Section 75 of the *Corrections and Conditional Release Act*, S.C. 1992, c.20 (the "*Act*") states that inmates are entitled to reasonable opportunities to freely and openly participate in and express religion or spirituality, subject to security and safety limits. Section 101 of the *Corrections and Conditional Release Regulations*, SOR/92-620 (the "*Regulations*") further provides that the necessities required for an inmate's religion or spirituality should be made available to the inmate, including a special diet. Section 8 of CD880 also specifically stipulates that religious diets are to be provided subject only to safety and security concerns.

[6] These provisions are based on the fundamental right to freedom of religion found in the *Charter*. Section 2(a) states that everyone has the fundamental freedom of conscience and religion. In the Religious Diets General Guidelines, the CSC has recognized this *Charter* right as well as Article 18 of the *Universal Declaration of Human Rights* (1948) which also outlines the right to freedom of thought, conscience, and religion.

[7] In the grievance under review, the Applicant specifically requested that the CSC address the issue of whether his rights under the *Charter* entitle him to a vegetarian diet. The CSC refused to do so, despite the fact that, in the context of religious diets, it has recognized the application of the *Charter* and adjusted its procedures and policies accordingly.

[8] Thus, while the CSC has recognized its legal duty to facilitate the religious freedoms outlined in the *Charter*, freedom of conscience has effectively been ignored. Section 2(a) of the *Charter* affords the fundamental freedom of both religion *and* conscience, yet by the CSC's policy, inmates with conscientiously held beliefs may be denied expression of their "conscience". In my opinion the CSC's approach is inconsistent. The CSC cannot incorporate s.2(a) of the *Charter* in a piecemeal manner; both freedoms are to be recognized.

[9] Vegetarianism is a dietary choice, which is founded in a belief that consumption of animal products is morally wrong. Motivation for practising vegetarianism may vary, but, in my opinion, its underlying belief system may fall under an expression of "conscience".

[10] In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at 346, Dickson J. stated that the rights associated with freedom of individual conscience are central to basic beliefs about human worth and dignity, and that every individual should be free to hold and manifest whatever beliefs and opinions his or her conscience dictates. Justice Dickson further articulated the broad scope of s.2(a) as follows:

Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

[11] Therefore, in my opinion, just as the entitlement for a religious diet may be found in s. 2(a) of the *Charter*, a similar entitlement for a vegetarian diet exists based on the right to freedom of conscience.

[12] This entitlement is further bolstered by the guiding principles for the CSC as outlined in the *Act*. Section 4(e) states that inmates retain the rights and privileges of all members of society, except those which are necessarily removed or restricted because of the sentence. Section 4(h) further stipulates that correctional programs, policies and practices should be responsive to the needs of offenders with special requirements. These broad principles reinforce the view that dietary needs based on religion or conscience should be accommodated.

[13] It is important to note that, in the context of special diets available to inmates, religious diets and vegetarian diets are closely related. The CSC Religious Diets General Guidelines indicate that, in practice, many religious diets include some form of a vegetarian menu. As a result, accommodating a vegetarian's conscientiously held beliefs imposes no greater

burden on an institution than that already in place for the provision of religious diets. In fact, the guidelines reveal that the CSC has conducted the necessary research to enable it to provide properly planned and nutritious vegetarian menus. The CSC has taken positive measures to ensure that religious freedoms are protected. In my opinion, positive measures also must be taken to facilitate freedom of conscience, subject only to the same safety and security limitations that exist for accommodation of religious beliefs.

[14] For an inmate to take advantage of this finding, cogent evidence must be produced to prove the conscientious belief to a balance of probabilities. On the evidence in the present case, I have no difficulty finding that the Applicant does have a strongly held belief regarding the consumption of animal products. The Applicant's numerous requests and grievances regarding this issue, the extensive time and effort he has expended on this judicial review, as well as his sustained efforts to maintain a vegetarian diet, is strong evidence that he holds a conscientiously held belief that falls under the meaning of "conscience" under s.2(a) of the *Charter*. In my opinion, both the *Charter* and the Corrections and Conditional Release legislative scheme entitle the Applicant to a vegetarian diet.

[15] In the application material Mr. Maurice is noted as objecting to eating certain vegetarian foods, such as onions, mushrooms and garlic. However, at the hearing of the present application, Mr. Maurice specifically stated that his primary interest in bringing the application is to be served a lacto vegetarian diet while incarcerated. Upon immediately receiving instructions with respect to this very specific request, counsel for the Respondent was able to say that, if it is decided that the Applicant has a s.2(a) *Charter* right which has been infringed, the Respondent has no objection to meeting the Applicant's request for a vegetarian diet.

ORDER

[16] Accordingly, I hereby set aside the decision in Grievance Number V3000A000883, and refer this matter back for redetermination in accordance with these reasons.

[17] I award the Applicant costs for his proven out of pocket expenses, which I find to be $1,560.00.

"Douglas R. Campbell"

Judge

Edmonton, Alberta

January 21, 2002.

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1487-99

STYLE OF CAUSE: Jack Maurice v. Attorney General of Canada

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: January 21, 2002

REASONS FOR JUDGMENT : CAMPBELL, J.

DATED: January 21, 2002

APPEARANCES:

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Litigant in Person
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Mr. Eric Lafreniere
Department of Justice
FOR THE RESPONDENT

SOLICITORS OF RECORD:

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